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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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IN THE

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NO.

PEN-KEN GAS & OIL CORPORATION,
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Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, by its attorney of record, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above entitled cause.

Opinions Below.

The Opinion of the District Court of the United States for the Eastern District of Kentucky was rendered on Feb-

ruary 3, 1942, and is reported in 2nd Fed. Rules, Dec. p. 355 (R. 286). The Opinion of the Circuit Court of Appeals (R. 335) is reported in 137 Fed. (2nd) 871. An additional opinon on rehearing appears in 137 Fed. (2nd) 885 (R. 401).

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended. The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered on August 31, 1943.

Statutes and Rules Involved.

Rule 56 (c) * * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Act Relating to Revenue and Taxation, being Chap. 22 of the legislative acts of the Commonwealth of Kentucky, adopted in 1906, a synopsis of which is set forth in the Appendix.

Section 56 of the Civil Code of Practice of Kentucky, Chap. II, entitled Service of Summons, Article 1, Actual Service, Section 56,

> "Non-residents, except infants. * * * If a defendant be out of this State the plaintiff may take a copy of the petition, certified by the clerk, with a summons annexed thereto, warning him to appear and answer the petition within sixty days after the same shall have been served upon him, and may cause a copy thereof to be delivered to such defendant by a person to whom he is personally known. Proof of the delivery shall

be made by the affidavit of the person making it, indorsed on or annexed to the certified copy and summons, in which the time and place of the delivery, and the fact that the defendant was personally known to the affiant shall be stated."

Chapter II, Service of Summons, Article 2, Constructive Service, Section 57,

"Constructive service; warning order. If the defendant be—

"7. Warning order; when to be made. If his name and place of residence be unknown to the plaintiff, the clerk shall, subject to the provisions of Section 58, make upon the petition an order warning the defendant to defend the action on the first day of the next term of the court, which does not commence within sixty days after the making of the order."

Questions Presented.

I. When the pleadings and contradictory affidavits of the parties establish that there are genuine issues on material facts may the trial court enter summary judgment?

I (a) When there is no clear showing that no genuine issue as to material facts remains for trial may summary judgment be entered?

II. When a special Statute state as to forfeiture to the State of title in lands for non-payment of taxes directs the manner of effecting and recording such forfeiture, and the record is silent as to a compliance with those prerequisites, may the court indulge in a presumption of such compliance?

III. When a special State statute requires in a forfeiture proceeding, a recording of the forfeiture judgment, a sale of the land for cash and an accounting to the owner

of record, may the owner of record, or one holding title through such owner, be held to have been divested of all his title and interest in and to said land, upon a mere showing of a forfeiture judgment alone, with no recording, no sale and no accounting?

IV. Where a special State statute of forfeiture to the State of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, including the recording of the judgment and sale, and such statute is repealed, without a saving clause in favor of pending actions, before there has been a completion of the forfeiture by recording of the judgment or a sale, may that forfeiture be set up as a bar to the right of the owner of record, or one holding title through such owner, to assert his rights of ownership in the land?

V. Where one section of a State statute provides for "actual" and personal service on non-residents whose addresses are *known*, and another section for "constructive" service upon non-residents whose addresses are *unknown*, does the trial court obtain jurisdiction of a non-resident whose address is known where the service is by the constructive and not by the actual process?

VI. Does the judgment of forfeiture of title to lands described as located in one County of the State of Kentucky operate to forfeit the title to all lands of the parties defendant in other Counties of the State, in an action brought under the Forfeiture Act of the State of Kentucky?

VII. May the decision of this court in *Eastern Kentucky Coal Lands Corporation* v. *The Commonwealth*, 219 U. S. 140, affirming the judgment of the Pike Circuit Court in

the same case (111 S. W. 362), be relied upon as authority for the factual determination that the judgment of the lower court forfeiting the lands embodied within the Haskell grant to the Commonwealth of Kentucky, was valid in all particulars and that appellant and its predecessors in title had no interest in the lands covered by the grant?

VIII. May a judgment in a forfeiture proceeding under the Forfeiture Act of Kentucky be relied upon as constituting a divesting of the property right of the owner with respect to lands on which taxes had been paid for three of the five year period prescribed in the Forfeiture Act?

Reasons for Granting the Writ.

1. The Circuit Court of Appeals of the 6th Circuit has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings in the application of the rules governing summary judgment as to call for an exercise of this court's supervision.

2. The decision of the court below constitutes an affirmance and approval of the decision of the lower court in depriving this petitioner of its property rights on the basis of a series of unwarranted presumptions without due process of law.

3. The decision of the court below, that a literal or substantial compliance with the procedural prerequisites of the Forfeiture Act of Kentucky, in the original proceeding, must be presumed, in the absence of proof of non-compliance, is in direct conflict with the decision of the same court in *Heine* v. *U. S.*, C. C. A. 6th; 135 Fed. (2d) 914; the decision of the C. C. A. for the 4th Circuit, in *Johnson* v. *Jarvis*, 223 Fed. 756; the decision of this

court in *Applegate* v. *Lexington & Carter Company Mining Company*, 117 U. S. 255; and the decision of *Moorman* v. *Taylor*, 255 Ky. 347; and is in direct conflict with the generally accepted legal principle that judgments without notice to the parties in interest are "mere mockeries and in no sense judicial proceedings," but "mere arbitrary edicts or substantial frauds."

Bradstreet v. *Insurance Co.*, 3 Sumn. 601 quoted in *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

4. The conclusion of the court below, that "the record of the forfeiture suit in evidence ends with the mandate of the Supreme Court" in the case of *Commonwealth* v. *Eastern Kentucky Coal Lands Corporation* (217 U. S. 140) and that plaintiff and its predecessors in title therefore had no interest in the lands, is an erroneous application of the decision of this court in that proceeding.

5. The court below indulged in the unwarranted process of supplying an additional finding of fact that, "There is no showing of record that Boyd had any interest in the land at the time of, or subsequent to, the commencement of the future action," and this in the light of the uncontradicted and undenied facts of record that (a) the taxes against the Haskell grant were assessed in 1903-04 against Boyd and Selden (R. 254-55); (b) the taxes paid upon the Haskell grant in 1901 were paid and a receipt (in evidence R. 261) given to Boyd and Selden (R. 261), and (c) other tax receipts were at one time in the possession of the plaintiff covering the years 1895 to 1908, inclusive, for taxes assessed upon the Haskell grant (R. 257) and taxes in fact were paid for three years of the five-year period.

6. A conservative estimate of the value of the min-

eral deposits, natural gas and other property taken from the lands of this petitioner is in excess of seventy million ($70,000,000) dollars and the right of this petitioner to be reimbursed for this unlawful taking and to be restored to its rightful position as owner will be lost without the aid and assistance of this court.

7. The issues involved relate to the general principles of legal procedure in forfeiture proceedings and are of wide general interest and of grave importance.

8. If the decision of the Circuit Court of Appeals is to stand, it will leave the law in hopeless state of confusion as it is contrary to the law as decided by this Court, the Court of Appeals of Kentucky and the decisions of other Circuit Courts of Appeals.

9. The decision of the court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings, with respect to the property rights of this petitioner and all persons subject to the forfeiture provisions of state laws as to call for an exercise of this court's power of supervision.

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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IN THE

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Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

Suit filed May 9, 1940. Plaintiff's claim is in two counts for damages. The first count is that in 1930, and thereafter, the defendant entered the real estate of plaintiff described by metes and bounds in the complaint, situated in Knott, Floyd, and Pike Counties, Kentucky, constructed numerous wells thereon, and extracted large quantities of natural gas which it converted to its own use. The second

count is that defendant entered upon and ejected plaintiff from said real estate. The damages claimed are $70,466,900.00.

The defendant answered, admitting diversity of citizenship and that the court had jurisdiction. The answer denies plaintiff is the owner of the real estate described; admits defendant has drilled gas wells and constructed pipe lines upon, and extracted natural gas from, portions of Pike and Floyd Counties in the area claimed by plaintiff; denies that natural gas was extracted to the value claimed, and alleges that defendant rightfully entered said real estate and extracted natural gas by reason of leases made from lessors who were rightful owners of said portions of said real estate, which leases and locations are hereinafter set forth in detail. Defendant denies that it wrongfully entered upon and ejected plaintiff and denies plaintiff is entitled to possession or to damages.

The property involved in this suit is a part of a Virginia grant of 300,000 acres made February 16, 1797 (R. 57-58), to Benjamin Haskell, and will hereinafter be referred to as the "Haskell grant." It lies in Pike, Floyd, Knott and Letcher Counties and is shown on a map marked Defendant's Exhibit A (R. 136). It is admitted that on February 26, 1931, Whitney and wife executed a deed to the plaintiff (R. 210); that on June 31, 1931, Arvidson and wife executed a further deed to the plaintiff (R. 206-7). Plaintiff became, and was at the time of the filing of the suit, vested with legal title to the Haskell grant through and by a complete chain of title, commencing with the original grant to Benjamin Haskell (R. 137).

Defendant filed eight affirmative defenses and moved to dismiss the suit by summary judgment, supported by affidavits, and a complete certified transcript of the record

of a certain proceeding (hereafter referred to as Pike County forfeiture suit) filed in the Supreme Court of the United States in *The Eastern Kentucky Coal Lands Corporation* v. *The Commonwealth of Kentucky* (55 L. Ed. 137) (R. 29-126), which was admitted by plaintiff to be a complete transcript of the proceedings had and by virtue of which it was claimed by defendant title was forfeited to the Commonwealth of Kentucky by the Pike County Circuit Court for non-payment of taxes in 1907.

Owners or claimants other than those interested in the Haskell grant appealed from the Pike County forfeiture proceeding and the constitutionality of the Forfeiture Act was sustained by the Court of Appeals of Kentucky (111 S. W. 362) and by this court (55 L. Ed. 137). None of the questions here presented is passed upon by either the Court of Appeals of Kentucky or by this court in the forfeiture litigation.

Plaintiff filed counter-motions to strike the motion for summary judgment and the affidavits attached thereto; strike, overrule and deny each of the affirmative defenses; strike, overrule and deny each of the five grounds set forth in defendant's motion for summary judgment (R. 223-227).

Plaintiff further filed its answer on the facts with supporting affidavits and moved the court to enter summary judgment in favor of the plaintiff, upon each and every affirmative defense of the defendant; moved the court to deny the motion of defendant for summary judgment upon each of the grounds set forth by defendant; and demanded a jury trial on every factual question and issue in the cause (R. 227-271).

Defendant did not question the sufficiency or form of any of plaintiff's affidavits which plainly raised genuine issues on the material facts.

It is the contention of plaintiff the forfeiture proceedings for non-payment of taxes, so far as it purported to forfeit the Haskell grant, was null and void, and even though valid was limited to that part of the Haskell grant lying in Pike County by virtue of the limitations of the complaint and the judgment of forfeiture.

At the time of the filing of the Pike County forfeiture suit, there was in full force and effect a statute (Chapter 22 of the Act of the General Assembly of 1906, Carroll's Kentucky Statutes), entitled "An Act Relating to Revenue and Taxation." The Pike County forfeiture suit and a subsequent forfeiture suit commenced by the Commonwealth in Floyd County, were predicated upon Article III of said legislative act. That part of the Act necessary to a decision of this case is set forth in the Appendix.

The Commonwealth's forfeiture complaint in Pike County alleged that a part of the grant was within the boundaries of Pike County, Kentucky (R. 37). In the body of the complaint Robert Boyd and Charles Selden were described as known owners and claimants (R. 40), and the address of Charles Selden was stated to be New York City (R. 40). Charles Selden was named and made a party defendant in the caption of the petition (R. 36-37), prayer (R. 52), and warning order (R. 55-56). Robert Boyd, described as a known owner of the Haskell grant in the body of the petition, was not named as a party defendant in the caption, prayer or warning order. Other parties described as being owners or claimants in the Haskell grant were not in fact owners or claimants (R. 55). Neither Boyd nor Selden were personally served with summons and did not appear individually or by attorney in the Pike County forfeiture proceeding. If valid service was had on them it was by publication notice under Sec. 3, Article III.

Section 3 of Article III requires a notice of the pending forfeiture action to be given "by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted." The record is silent as to any attempt on the part of the clerk to comply with this prerequisite of the statute.

Section 3 of Article III also required compliance with the requirements of the Civil Code of Practice of Kentucky respecting process and service. Sections of the Civil Code of Practice of Kentucky applicable to said forfeiture proceeding are: Section 56 (actual service), and 57 (constructive service) aforesaid.

No service was had upon any of the parties through whom this petitioner here acquired its title as required by Section 56. No warning order was ever made by the clerk as required by Section 57.

By judgment entered June 20, 1908, the title to the Haskell grant in Pike County was forfeited and said title and claim thereto "is now transferred to and vested in the Commonwealth." No further proceedings were had in said forfeiture proceeding other than an appeal to the Supreme Court of Kentucky and then to the United States Supreme Court on questions of law relating to the constitutionality of the forfeiture statute.

Under Article III, Sec. 4, certified copies of the judgment of the Circuit Court of forfeiture and sale were required to be "recorded in the deed book of the county where the land or any part thereof lies and indexed as deeds are required to be indexed." The Pike County forfeiture judgment was not recorded in Pike, Floyd, Knott or Letcher Counties (R. 246-248, Par. 15).

Article III of the forfeiture statute was repealed on April 21, 1938, without a saving clause respecting pending litigation.

On January 3, 1941, the Commonwealth of Kentucky filed a second forfeiture proceeding in the Circuit Court of Floyd County, Kentucky, which petition was directed against the entire Haskell Grant. Proper service was made on your petitioner and others in this proceeding.

Petitioner here answered said petition, admitting it was the owner, and denying that it had not listed said property for taxes in said County, and further set forth the following:

(1) "That this court is wholly without jurisdiction for the reason that said Article III of Chapter 22 of the Acts of the General Assembly of 1906, upon which the said suit is predicated, was repealed by an Act of the General Assembly at the first special session held in 1938, and that said Act relied upon by the plaintiff in this suit is not now, and was not at the time of the commencement of this suit, in force or effect," and

(2) "A forfeiture proceeding was heretofore and on, to wit, the 3rd day of June, 1907, commenced in the Pike County Circuit Court to forfeit said grant under the legislative acts of the State of Kentucky then in full force and effect; that it is claimed by the Commonwealth that said suit forfeited said Haskell grant in its entirety so far as the same lay in the State of Kentucky, and that said suit is still pending and undetermined, and that the Pike County Circuit Court has full and exclusive jurisdiction, and that this court is wholly without jurisdiction of the parties or of the subject matter, and that the rights of the Commonwealth and these defendants must be determined by the Pike Circuit Court and cannot be determined by this court." (R. 36-54).

Upon the trial of the forfeiture proceeding in Floyd County held on May 2, 1941, plaintiff moved to dismiss said suit on the two jurisdictional grounds mentioned and described in the preceding paragraphs, which motion was overruled, and upon the trial the jury returned a verdict in favor of the Commonwealth (R. 274).

ARGUMENT.

I.

A summary judgment proceeding can never be sustained where there is a controverted question of fact and if it becomes necessary for the court to weigh the evidence the motion for the summary judgment must be denied.

Up to the time of the decision in the present case, the law was clear that a summary judgment can only be awarded when the truth is clear and the facts not controverted.

Wyant v. *Crittenden*, 113 Fed. (2d) 170 (C. C. A. D. C.).

American Ins. Co. v. *Gentle Bros. Co.* (C. C. A. 5th, Fla. 1940), 109 Fed. 2d, 732; Certiorari denied in 1940, 60 S. Ct. 1075, 310 U. S. 633, 84 L. Ed. 1403;

Port of Palm Beach Dist. v. *Goethals* (C. C. A. 5th, Fla. 1939), 104 Fed. 2d, 706;

Dairy Engineering Corp. Ltd. v. *De-Raef Corp.* (D. C., Mo. 1941), 1 F. R. D. 679;

U. S. v. *Newbury Mfg. Co.* (D. C. Mass., 1941), 1, F. R. D. 718;

Whiteman v. *Federal Life Ins. Co.* (D. C., Mo. 1939), 1 F. R. D. 95.

Plaintiff was entitled to the "benefit of every doubt" *Weisser* v. *Mussam*, 127 Fed. (2nd) (C. C. A. 2nd), 344, 346.

The law is clear that the District Court on defendant's motion for summary judgment is duty bound to take account of all of the facts and allegations stated in affidavits of the parties, and not merely of those facts set forth by the defendant.

Wyant v. *Crittenden,* 113 Fed. (2d) 170.

The law is equally clear that a motion for summary judgment should only be sustained in a very clear case.

Whitman v. *Federal Ins. Co.,* 1 F. R. D. 95.

A summary judgment is a drastic remedy and never warranted except on a clear showing that no genuine issue as to any material facts remains for trial.

Schultz v. *Manufacturers & Traders Trust Co.,* 1 F. R. D. 45.

Plaintiff had demanded a trial by jury on all questions of fact (R. 230).

In making its decision in the present case, the Circuit Court of Appeals passed upon controverted questions of fact:

(1) The affidavits of the defendant and the plaintiff as to adverse possession are contradictory and show genuine issues on material facts.

(2) The posting of the publication notice in connection with which it is said in the opinion on the rehearing (R. 404):

> "Fairly weighing the evidence in the record of the posting of the notice and considering the lapse of time since the judgment in question was entered and the fact that the records are lost, it seems to us that the only judicial deduction now possible is that the peti-

tion was duly posted at the court house door as required under the statute."

(3) The payment of taxes discussed under Point VIII.

Each of these factual questions was controverted and the decision is in direct conflict with the decisions of the District of Columbia, Fifth, and Second Circuit Courts of Appeals as well as the decisions of the District Courts of Missouri and Massachusetts. A correct statement of the law by this Court on this point is of grave importance.

II.

Where a special State Statute as to the forfeiture to the State of title in lands for non-payment of taxes prescribes the procedural steps to be taken to legally effect and record such forfeiture, the fact of literal compliance with those prerequisites must appear of record to give the court jurisdiction.

The dilemma in which the Circuit Court of Appeals found itself on this point is best illustrated by what the court said on rehearing (R. 403):

> "Appellant says that we improperly applied the rule that the failure of the Clerk to note on the original petition the posting of the notice at the court house door was a mere irregularity. The reasoning of the opinion on the subject of said posting may not be comprehensive or satisfactory, but the conclusion reached is correct."

This is, indeed, a novel method of arriving at a decision of a lawsuit, *i. e.*, reaching a conclusion by reasoning neither comprehensive nor satisfactory.

In the trial of the case below, there was admitted into the record on defendant's motion what the plaintiff agreed

was a true record and what had been certified to by the Clerk of the Supreme Court of the United States as the true record (a photostatic copy) of the Pike County forfeiture suit. The Circuit Court of Appeals adjudicated it to be a "complete transcript of the record" (R. 336). Defendant relied on this record to defeat plaintiff's title. An examination of this admittedly true record demonstrates clearly that there was (R. 344-5) no compliance with the forfeiture statute. The Circuit Court of Appeals recognized this jurisdictional deficiency in the record and resorted to a presumption that nevertheless the original record might have carried evidence of a compliance. The court in its first opinion said:

> "When a collateral attack is made on a judgment, the court will presume that all proceedings in the original action necessary to sustain the validity of the judgment, were regular." (R. 346).

On rehearing the court said:

> "the (forfeiture) judgment in question must stand or fall by the same rules of law as any other judgment,"

and that an error in the certified copy of the proceeding may have occurred (R. 403).

The Circuit Court of Appeals failed to make the distinction pointed out in numerous cases, between those cases where the statute does not require a record of the proof of publication and those cases where the statute does require a record of the proof of publication. Presumptions may be indulged in in the former but are never indulged in in the latter class of cases. Section 3 of Article III of the Kentucky Forfeiture Statute requires the Clerk, immediately after the forfeiture petition is filed to *show by endorsement upon the original petition the time at which*

the copy was posted at the front door of the court house. It is the endorsement on the original petition which gives the court jurisdiction, not the posting of the notice. Without such endorsement upon the original petition, no valid publication is made. This court in *Applegate* v. *Lexington & Carter Co. Mining Co.*, 117 U. S. 255, 270, definitely recognizes the distinction and sustains the point.

The law in the 4th Circuit, in *Johnson* v. *Jarvis*, 223 Fed. 756 (758) is stated as follows:

> "The contention that the title under which plaintiff claims was lost by forfeiture to the state for failure to return the land for taxes was strongly presented, But forfeitures are not favored, and the burden was on the defendant to make clear proof of the loss of land in this way."

Hence, we find the decision of the lower court squarely in conflict with the decision of the Circuit Court of Appeals for the 4th Circuit, the Court of Appeals of Kentucky and also in conflict with the decision of this court.

The most appropriate citation petitioner can make as to the authority for the application of the principle of law here involved that defendants and the lower court are bound by the certified record of the Pike County forfeiture offered by defendant to defeat plaintiff's title is a decision of the same Circuit Court of Appeals to which this petition for a writ of certiorari is directed, made at the same term, and where the same court said:

> "There can be no presumption contrary to an undisputed fact. The fact negatives the presumption."
> *Heine* v. *United States*, C. C. A. 6th, 135 Fed. (2d) 914.

In *Moorman* v. *Taylor*, 285 Ky. 347, the Court of Appeals of Kentucky recognized the distinction and held the stat-

ute must be literally followed and complied with in every prerequisite, and the record must show upon its face that the provisions of the statute have been complied with or the judgment will be treated as void and inoperative.

What the Circuit Court of Appeals adjudicated early in its first opinion as an undisputed fact, *i. e.*, a "complete transcript of the record," became in the opinion on rehearing an incomplete record, which to give it validity, required the aid and assistance of a presumption, that the Clerk of the U. S. Supreme Court made an error, and a further presumption that if the error were corrected, the record then might show that the Clerk of the Pike County Circuit Court made the statutory endorsement on the original petition. Obviously the conclusion reached is no more comprehensive or satisfactory than the reasoning used. Both the reasoning and the conclusion reached are unsound and if the conclusion reached is to stand the law on the subject is in hopeless confusion.

III.

Where a special statute requires the recording of a forfeiture judgment and a sale for cash and an accounting to the owner of record, the mere rendering of the forfeiture judgment without recording and without sale and without accounting to the owner, does not divest the owner of his title and interest in said land, nor can such judgment be set up as a bar to the owner or one holding through him to assert his rights of ownership in the land.

Sec. 4 of Art. III of the forfeiture statute required that certified copies of the forfeiture judgment "shall be recorded in the deed book of the county where the land or any part thereof lies and indexed as deeds are required

to be indexed." The record clearly shows that there was no compliance with this section of the statute.

Sec. 3 of Art. III of the forfeiture statute provided that the prayer of the petition shall be "for a judgment of forfeiture and sale of the title or claim in the petition described."

Sec. 4 provided for redemption and purchase back by the owner.

Sec. 7 provided that title to the land not purchased back by the owner under Sec. 4, and not vested in the occupant as provided in Sec. 6, "shall be sold to the highest and best bidder for cash in hand." A sale was required to be made under a judgment of the court at public auction at the front door of the court house after notice of sale had been advertised in the manner required by law in the case of the sale of land under execution. The sale was required to be confirmed by the court and the money realized from the sale was to be distributed by order of the Court first, to the payment of the costs of the suit, to be fixed by the court, second, to the payment of the taxes due to the County and State, and third, "the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns."

The record is absolutely silent as to any compliance with the cited sections of the Forfeiture Act of Kentucky, even to the point of recording the forfeiture judgment.

The court below recognized this deficiency in the record and resorted to an erroneous construction of the statute in holding that there was no necessity of a sale or account-

ing to the former owner where there was a showing of adverse possession under Sec. 4 of the statute. Assuming, without conceding, that this interpretation is correct there is positively nothing in the record to establish the fact of adverse possession of the lands in controversy at the time of the forfeiture suit. Furthermore, this interpretation of the statute is in direct conflict with the decisions of the courts of Kentucky which must be followed with respect to forfeitures under the Forfeiture Act of Kentucky. See *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

A sale is required. *Kentucky Union Company* v. *Commonwealth*, 108 S. W. 931. In *Davidson* v. *Lewis, Judge*, 159 Ky. 798, 169 S. W. 538, in a mandamus action, it was held to be the mandatory duty of the Judge, after the waiting time required by Section 4 had lapsed, to order a sale of the entire forfeited title irrespective of rights of adverse claimants. This decision affirmed the law laid down in *Kentucky Union Company* v. *Commonwealth*, 128 Ky. 610, 108 S. W. 931. Both of these cases were reaffirmed in *Flinn* v. *Blakeman*, 254 Ky. 416, 71 S. W. (2d) 951, and *Fordson Coal Co.* v. *Mills*, 234 Ky. 64, 27 S. W. (2d) 382.

The decisions in the cited cases may be applied with greater effect in the instant case by reason of the fact that it may reasonably be presumed that there was a recording of the forfeiture judgment in those cases, whereas in the instant case the record is silent even as to the recording of the judgment.

Section 3 of the Forfeiture Act provides:

> "The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title

> or claim sought to be forfeited is based; and no other title, claim or possession or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described."

The language is clear. The decisions of the Kentucky Court last above cited are uniform. There *must* be a sale and the purchaser at the sale is required to litigate any question of possession with adverse claimants mentioned in section 5 by an independent suit or suits. The Circuit Court of Appeals indulged in an unwarranted presumption in holding that a sale in the present case was unnecessary because all of the Haskell grant might be in possession of adverse claimants not even parties to the forfeiture proceeding under section 5 and hence a sale was unnecessary.

All that the Commonwealth of Kentucky acquired by reason of the forfeiture judgment here under review was a lien upon the land and the owner was not and could not be divested of title until there was a sale, preceded and succeeded by all of the other requirements of the statute.

Keyes v. *State*, 121 Maine 306.

Thevenin v. *Lessee of M. D. Slocum*, 16 Ohio 519.

Any other interpretation of the statute is tantamount to saying the State may divest an owner of his property without due process of law, and violates not only the provisions of the special statute but the due process clause of the State and Federal Constitutions. The decision reached is in conflict with the settled law of Kentucky and the decisions of this Court and hence requires the exercise of the supervisory powers of this court.

IV.

Where a special State Statute of forfeiture to the State of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, and that Statute is repealed before all of such steps have been taken, without a saving clause in favor of pending actions, any judgment rendered under the repealed Statute may not be set up as a bar to the right of the owner, or one holding title through such owner, to assert his right of ownership in the land.

The Court below found that all of Article III (the forfeiture statute) was repealed by the Commonwealth of Kentucky, in 1938, without a saving clause respecting pending litigation (R. 354-5). Under the decision of this court in *South Carolina* v. *Gaillard*, 101 U. S. 433, 428, such a repeal stops all suits where the repeal finds them and no relief could thereafter be granted.

At the time of repeal the forfeiture proceeding with respect to the Haskell grant was still pending, awaiting recording, sale and distribution. There had been no divesting of title in the then present owners, nor could there be a divesting of title after repeal of the statute under which the action was instituted.

The decision that the owners' title was divested without a sale and accounting to the owner is in conflict with the decisions of this court and that of the states of Maine (*Keyes* v. *State*, 121 Me. 306), and Ohio (*Thevenin* v. *Lessee*, 16 Ohio 519).

V.

Where one section of a State Statute provides for "actual" and personal service upon non-residents whose addresses are known, and another section for "constructive" service upon non-residents whose addresses are unknown, the trial court does not obtain jurisdiction by constructive service of non-residents whose addresses are known.

Sec. 56 of the Acts of the General Assembly of the Commonwealth of Kentucky, 1890 Session, Ch. 876, page 101, provides for actual and personal service on non-residents whose addresses are *known*, and Sec. 57 of the same Act of the Legislature provides for constructive service on non-residents whose addresses are *unknown*. The Court below construed these sections of the Kentucky Legislature to be alternative methods of procedures in making service on non-residents. The court, however, admits in its opinion (R. 349) that these sections of the State Legislature have never been subject to interpretation or construction by the Court of Appeals of Kentucky. Based on the mere fact that these sections of the statute had never been subject to construction by the highest court of the State the court below presumed the sections to be alternative. This construction is diametrically opposed to the generally accepted principles of law that constructive service can never be substituted for actual and personal service in the absence of a showing that actual and personal service cannot be had.

Constructive service was unknown at common law and is limited to cases of necessity.

Statutes providing for service of process by publication have been generally sustained when assailed on constitutional grounds but only where personal service cannot be

had, and is never permissible where personal service is practicable, even though personal service is difficult to obtain. For a collection of cases on this subject, see 50 Corpus Juris, p. 498, Sec. 107; p. 496, Sec. 105, and p. 516, Sec. 150.

There is presented by this point an important public question which has not been decided by this court or the courts of Kentucky or the courts of last resort of any other state.

VI.

The judgment of forfeiture of title limited to lands in one county of the State of Kentucky does not operate to forfeit title to all lands of the same parties defendant in all counties of the State in an action brought under the forfeiture act of the State of Kentucky.

The court below seems to have recognized this principle of law but proceeded to conclude that all of the lands of the Haskell grant passed under the forfeiture proceeding brought in Pike County. This conclusion is predicated on the assumption that all of the Haskell grant was embraced in the petition before the court in Pike County.

This conclusion does not harmonize with the acts of the officials of the State of Kentucky for the record discloses that when this point was raised with respect to the Haskell grant in the proceeding below the officials of the State of Kentucky in 1941 instituted a proceeding in the Floyd County Court covering the same Haskell grant in its entirety and included the land in Pike, Floyd, Knott and Letcher Counties (R. 264-271).

It is jurisdictional under Article III of the Forfeiture

statute that the Commonwealth file as an exhibt with its forfeiture petition a "copy of the grant". (Sec. 3, Art. III.) The Commonwealth did file a copy of the Haskell grant to satisfy this jurisdictional requirement which did not extend the courts jurisdiction over property not described in the petition.

It is the settled law in Kentucky that the owner may claim to own the entire land set forth in the boundary of the grant (*Eastern Kentucky Coal Lands Co.* v. *Commonwealth*, 111 S. W. 362), or he may claim a part upon which he has paid taxes (*Lockard* v. *Commonwealth*, 118 S. W. 331, 133 Ky. 369), so long as he properly identifies and describes the land which he claims to own. (*Commonwealth* v. *Gatliff*, 116 S. W. 263, 132 Ky. 95.) A case of forfeiture is not made against any acreage named in the grant upon which taxes have been paid. (*Commonwealth* v. *Cornett*, 146 Ky. 45, 141 S. W. 366.)

Obviously, the Commonwealth only had a cause of action for forfeiture against that part of the grant upon which taxes had not been paid, and obviously the Commonwealth had the right to limit its forfeiture proceeding to a portion of the grant less than the whole and did so in the instant case. There is not the slightest indication that the petition did or was intended to cover the whole Haskell grant. On the contrary, it clearly appears the petition was carefully and deliberately drawn with the intention of confining the court's jurisdiction in the Pike County forfeiture suit to that part of the Haskell grant in Pike County, *viz.*:

1. The caption states that the suit is against certain named defendants, unknown owners and certain tracts of land. The forfeiture suit involved 22 patents and in each

and every instance in the caption of the forfeiture petition the description is limited to "all that part that is situated in Pike County, Kentucky * * *." (R. 37).

2. The tracts of land sought to be forfeited in the forfeiture petition are next described in the body of the petition, and again each, every and all of the descriptions are limited to "all that part that is situated in Pike County, Kentucky * * *" (R. 38).

3. It further appears in the body of the forfeiture petition that the Commonwealth had caused an examination to be made of the owners and the assessment and payment of taxes and that examination appears from apt words in the forfeiture petition to have been definitely limited to Pike County (R. 39).

4. The detail of this examination includes the examination of deeds, mortgages and conveyances and no deeds, mortgages or conveyances are described other than those of record in Pike County.

5. The testimony of the witness for the Commonwealth in support of the forfeiture petition was limited to the listing and payment of taxes in Pike County (R. 88-114).

6. The letter of the attorney for non-residents and unknown defendants stated that there had been filed a petition in the Circuit Court Clerk's office of Pike County against "yourself and others as claimants under the surveys and patents hereinafter stated of the land therein described * * *," and "the petition described each tract by metes and bounds * * *" and that "each and all of said tracts of land lie wholly or partially within the County of Pike" (R. 72).

7. The attorney for non-residents and unknown defendants further stated "the tracts of land, title to which is sought to be forfeited * * * are described in the enclosure herewith, which is a copy of the caption of the petition insofar as it describes and refers to the patents and surveys * * * sought to be forfeited * * *." (R. 72).

8. The judgment in the forfeiture proceeding is directed against "the lands in said petition and hereafter described," and the description of the lands "hereafter described" in the judgment order respecting each of the tracts of land, in each and every instance is limited to "all that part that is situated in Pike County, Kentucky * * *." (R. 128).

9. A part of the Haskell grant lies in Floyd, Knott and Letcher Counties and not one of these counties is so much as mentioned in the petition or in the forfeiture judgment.

So it appears conclusively and definitely that on each occasion when there was an opportunity to make reference to the lands against which the forfeiture proceeding was directed, the description of the land was limited to "all that part which is situated in Pike County, Kentucky."

Thus we find the decision of the lower court predicated upon a foundation which has no support in the record, the effect of which is to deprive the plaintiffs of their property in Knott, Fletcher and Floyd Counties without due process of law. This is so, even assuming the forfeiture proceedings to be valid in all respects.

VII.

The judgment of this court sustaining the constitutionality of the Kentucky Forfeiture Statute may not be relied upon as a basis for a factual finding that the judgment of the Pike Circuit Court forfeiting the lands embodied within the Haskell Grant to the Commonwealth of Kentucky was valid in all particulars and that plaintiff and its predecessors in title therefore had no interest in the lands covered by the grant.

The question of the validity of the forfeiture proceeding was not involved in that case when it reached this court on review. The sole question involved was the constitutionality of the Forfeiture Act of Kentucky. This is evidenced by the language of Mr. Justice Day in proceeding to a consideration of the issues involved, wherein he said:

> "This court is concerned only with the constitutionality of the law in view of applicable provisions of the Federal Constitution", and passed "questions which are purely of a state character, and which were ruled upon against the contentions of the plaintiff in error by the court of appeals of Kentucky." 219 U. S. 140, 151; 55 L. Ed. 154.

VIII.

A judgment in a forfeiture proceeding under the Forfeiture Act of Kentucky may not be relied upon as constituting a divesting of the property right of the owner of lands with respect to which he has paid the taxes for three of the five years prescribed by the Forfeiture Act.

There is no dispute that the predecessor in title to this petitioner paid taxes for three of the five years period from 1901 to 1905 prescribed in the Forfeiture Act, hence,

regardless of any other approach to the issues involved in this proceeding, the original forfeiture proceeding did not have the effect of divesting the title in the lands of the Haskell grant held by the predecessors in title to the petitioner here.

In the Pike County forfeiture proceeding, in sustaining the constitutionality of the law, the Court of Appeals of Kentucky said:

> "The forfeiture is not a tax nor is it the equivalent It is a penalty imposed for the violation of a statute * * *.
>
> "A sale for taxes that have been paid is void; therefore it is of the first consequence that the assessments should be such as that if the lands were sold under it, the title of the taxpayer would pass, otherwise no one would be justified in bidding at the sale, and the State would get none of its taxes in spite of its efforts. Furthermore, if the taxpayer did not pay within the time fixed in the statute, and the State was elected to forfeit his title, if the assessment was ineffectual, the proceeding to forfeit must fall by the way."

This decision is a full and complete answer to the question presented. It is to the effect that there could be no judgment of forfeiture under the Kentucky statute with respect to lands on which taxes had been paid.

If defendant's affidavits put in issue a factual question as to the payment of taxes, the court was not authorized nor permitted to dismiss plaintiff's action in a summary proceeding (See Point I).

CONCLUSION.

In consideration of all of which it is respectfully submitted that the application for writ of certiorari should be granted.

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APPENDIX.

SYNOPSIS OF AN ACT RELATING TO REVENUE AND TAXATION

Chap. 22, Legislative Acts of 1906
Commonwealth of Kentucky.

ARTICLE III

SEC. 1. It shall be the duty of each and every owner or claimant of land to pay all the taxes which have been assessed, and which should have been assessed, against him, and those under whom he claims, as the owner or claimant of said land as of the 15th day of September, 1901, the 15th day of September, 1902, the 15th day of September, 1903, the 1st day of September, 1904, and the 1st day of September, 1905 and if the said owner or claimant, or those under whom he claims, has failed to list said land, or any part there of, for taxation, as of said dates, or any of them, it shall be his duty to have same assessed and listed for taxation, in the manner and within the time hereinafter provided, as of each of said dates for which the assessment has been omitted, and to pay the taxes, interest and penalties thereon as herein provided.

The fact that said land has been listed for taxation, or the taxes have been paid thereon, by another claimant, shall not relieve against the duty herein imposed.

If any such owner or claimant, or those under whom he claims, has failed to list such land for assessment and taxation, as of any three of said dates, or has failed to pay the taxes charged, or which should have been charged

against him, or those under whom he claims, as the owner or claimant thereof upon said dates, for any three of the years for which said assessments were, or should have been made, said owner and claimant and those under whom he claims are hereby declared to be delinquent; and such failures, or either of them, shall be cause for the forfeiture and transfer to the Commonwealth of his said claim and title thereto, in a proceeding to be instituted for that purpose, as hereinafter provided. But said cause for forfeiture shall be extinguished if said owner or claimant, his heirs, representatives, or assigns, shall, within the time and in the manner in this article provided, cause said land to be assessed for taxation, and, on or before March 1, 1907, pay the taxes charged and which should have been charged against him, or against those under whom he claims, as the owner or claimant thereof, for each and all of said five years, for which he or those under whom he claims are delinquent, together with the interest and penalties provided by law in case of the redemption of land sold for the non-payment of taxes.

SEC. 2. The ascertainment of the amount of taxes unpaid and the assessments required by the preceding section shall be made by the county court of the county wherein the land lies, upon the application of said owner or claimant, by a petition. * * *

It shall be the duty of the county court to decide upon said application in a summary manner, upon such evidence as may be offered. * * * Upon finding the amount, the court shall also ascertain the proportion of such taxes due for county and state purposes at the rates fixed by law for such year; and shall cause a record of the findings to be made on the order book of the court, and certified to the Auditor of the State and county clerk. * * *

Upon collecting said taxes, interest and penalties, the sheriff shall, after paying the costs of the proceedings and retaining the commission allowed by law for himself, pay over and account for the remainder to the Auditor of the State and to the county, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of other taxes collected by him. * * *

SEC. 3. If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in sections 1 and 2 of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the circuit court of the county in which said land or any part thereof lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them if their names are known to him, and if the names are unknown to him, designating them as the unknown owners and claimants thereof, for the purpose of declaring the title or claim of said defendants forfeited to this Commonwealth, and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far as applicable.

In addition to the requirements of the Civil Code of Practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the court house, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so

posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed notice to all defendants of the pendency of said action and its object.

The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described.

The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to, and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff.

Judgments rendered by the circuit court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subject to the provisions of sections 391, 410, 414 or 574

of the Civil Code of Practice. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

Either party may prosecute an appeal from such judgment to the court of appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the court of appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth.

SEC. 4. If, before or during the term of the circuit court next succeeding the term at which a judgment of forfeiture may have been entered, as authorized by section 3 of this article, any of the said defendants, in privity with the title so forfeited to, and vested in the Commonwealth, file his counter claim in said action, accompanied by a bond, with good and sufficient resident personal security, to be approved by the court, if in session, otherwise by the clerk of the court, conditioned to pay, and in all respects abide by and perform, the judgment that the court may enter upon such counter claim, and in said counter claim offer to purchase back from the Commonwealth the title and claim in said action so forfeited to, and vested in, the Commonwealth, and praying to be allowed so to do, and exhibiting title thereto in himself, it shall be the duty of the court, upon prompt pleadings as in other equity cases, and upon such evidence as may be adduced in the manner authorized by law, to ascertain and adjudge the amount of unpaid taxes, charged, and that ought to have been charged, against the defendant and those under whom he claims

as the owner or claimant of said land, for the fifty years immediately preceding the filing of such counter claim, and if the court finds and adjudges that said defendant is the owner of the title so forfeited to and vested in the Commonwealth, to enter a judgment against such defendant for a sum equal to the amount of the unpaid taxes charged, and that ought to have been charged, against said defendant, and those under whom he claims as the owner or claimant of said land, for said fifty years, together with interest thereon at the rate of 15 per cent. per annum from the time of the said unpaid taxes for said several years were due, and the costs of the proceedings, including a reasonable attorney fee for the Commonwealth's attorney, to fixed by the court. Provided, that no person except a defendant, and no defendant, except as herein provided, shall be allowed to purchase back from the Commonwealth the title so forfeited to, and vested in it, except such defendant as may, but for such forfeiture, establish in such proceeding a title thereto in himself upon which he could maintain an action of ejectment.

If, thereupon, such defendant shall pay to the sheriff the amount of such judgment, it shall be the duty of the court to enter a judgment re-transferring to such defendant the title and claim so forfeited to, and vested in, the Commonwealth; and said judgment shall have the effect of re-transferring and vesting same in said defendant without the execution of a deed or other instrument.

Should such defendant not thereupon pay said judgment, the court shall thereupon enter an order directing the sale of the said title and claim as in section 7 of this article provided, and the amount realized upon said sale shall be used in the payment of costs and commissions hereunder; and the remainder, if any, shall be paid

to the State and county as provided in this article, and the counter claim shall be dismissed. If the sale does not produce enough to pay the costs, an action may thereupon be maintained upon said bond for the costs, and reasonable attorney's fees for the Commonwealth and county attorney, to be fixed by the court.

If at any time during the pendency of said action it shall be made to appear that the bond theretofore tendered and approved by the court or the clerk is insufficient, additional security shall be required, and the failure to execute same upon being so required shall have the same effect as if no bond had been given originally, and the counter claim shall be dismissed.

Appeal may be prosecuted to the court of appeals from the judgment of the circuit court under this section within the time and in the manner and subject to all the conditions provided for appeals in section 3 of this article, except that the judgment of the circuit court as to the amount thereof shall be final and not subject to appeal.

All amounts paid to the sheriff under this section shall be by him received and paid out to the persons entitled to the same as costs, and the remainder to the Auditor of the State and to the county in proportion to the amount due them for taxes and penalties for the said fifty years, in the same manner and subject to the same responsibilities of himself and his bondsmen as in the case of taxes collected by him. Provided, that fees required by law to be paid to the Auditor shall be paid to him by the sheriff, and by the Auditor paid to the person entitled thereto. It shall be the duty of the county attorney to assist the Commonwealth's attorney in all proceedings under this article for which he shall be allowed the per centum as herein provided. Certified copies of the judgments of the circuit court, under sections 3 and

4 hereof, shall be recorded in the deed books of the county where the land, or any part thereof, lies, and indexed as deeds are required to be indexed.

* * *

SEC. 6. All title and claim proceeded against under this article and forfeited to, and vested in, the Commonwealth and not purchased back by the owner or claimant thereof, as authorized in section 4 hereof, whether such forfeiture be for past delinquencies or for future delinquencies as authorized under section 10 hereof, shall be, and is hereby, transferred to, and vested in, any person for so much thereof as such person, or those under whom he claims, has had the actual adverse possession for five years next preceding the judgment of forfeiture, under claim, or color of title, derived from any source whatsoever, and who, or those under whom he claims, shall have paid taxes thereupon for the five years in which such possession may have been or may be held and in those in privity with such person, his heirs, representatives or assigns, as to the mineral or other interests or rights in or appurtenant to such land.

SEC. 7. All title and claim to land transferred to, and vested in, the Commonwealth under the provisions of this article and not purchased back by the owner or claimant, as provided by section 4, and not vested in the occupant, as provided in section 6, shall be sold to the highest and best bidder for cash in hand. Said sale shall be made pursuant to a judgment of the circuit court in said action, and shall be at public auction at the front door of the court house on the first day of some regular term of the circuit or county court, after notice of sale shall have been advertised in the manner required by law in the case of the sales of land under execution. The commissioner shall report the sale to the court for its confirmation, and, when

confirmed, the court shall order the commissioner to make a deed to the purchaser. Such deed shall operate to transfer to said purchaser such title and claim to the land so forfeited and transferred to, and vested in, the Commonwealth as remains in it after the operation of section 6 of this article, and shall so recite.

The money realized from said sale shall be paid out and distributed as follows: First, to the payment of the costs of the suit, including commissioner's fee as fixed by law and a reasonable attorney's fee, to be fixed by the court and paid in the manner provided by law; second, to the county and State the proportion to which each may be entitled, together with interest and penalty, as in this article provided; third, the remainder shall be paid over to the former owner or claimant or his personal representatives or assigns.

SEC. 8. No action to enforce a forfeiture as authorized and provided in this article shall be instituted after the expiration of five years from the accrual of the right thereto.

(34)

No. 517

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In The
Supreme Court of The United States

OCTOBER TERM, 1943

PEN-KEN GAS & OIL CORPORATION,
Petitioner,

vs.

WARFIELD NATURAL GAS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief in Opposition to the Granting of the Writ

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No. 517

In The
Supreme Court of The United States

OCTOBER TERM, 1943

PEN-KEN GAS & OIL CORPORATION,
Petitioner,

vs.

WARFIELD NATURAL GAS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Brief in Opposition to the Granting of the Writ

STATEMENT

This is an ordinary suit brought for the purpose of recovering certain lands and for damages by reason of alleged trespasses thereon. Before the simplified procedure, it would have been an ordinary action of ejectment.

The defendant answered the petition and set up a number of defenses thereto. The defendant's answer is found at page 4 *et seq.* of the record. In addition to denying that petitioner had any title to the property for which it sues, certain affirmative defenses were set up in the answer, among others, that the title claimed by petitioner was adjudged to be forfeited by judgment of the Circuit Court of Pike County, Kentucky, rendered on the 20th day of February, 1908, and which judgment was duly affirmed upon appeal to the Court of Appeals of Kentucky and to the Supreme Court of the United States.

Another of the defenses is that petitioner's suit was barred by several statutory limitations requiring that such suits be brought within five years under certain conditions, within fifteen years and within thirty years.

On the 16th day of December, 1940, respondent filed its motion for summary judgment, contending that petitioner's suit was barred by the judgment of the Pike Circuit Court above referred to, and that it was also barred by the statute of limitations provided by Section 251 of the Constitution of Kentucky. This motion for summary judgment is found at page 25 *et seq.* of the record. Along with it was exhibited the record of the judgment of the Pike Circuit Court, the judgment of the Court of Appeals of Kentucky thereon, and the judgment of the Supreme Court of the United States thereon. There was also exhibited a certain petition filed by petitioner before the Securities and Exchange Commission in a proceeding pending before that Commission, which petition was sworn to by George E. Merrill, Secretary and Director of petitioner, on the 2nd day of February, 1940. This petition will be found at page 13 *et seq.* of the record.

To amplify and clarify the statements contained in the petition, affidavits were taken from the owners and claimants of the lands upon which this respondent held oil and gas leases, and also from other parties familiar therewith, identifying particularly the interest claimed by respondent and those under whom it claims. These affidavits are numerous and will be found at page 134 *et seq.* of the record.

This motion for summary judgment was served upon petitioner and duly filed on the 16th day of December, 1940, as appears from the order of the court entered on that day (R. 220), and in that order the case was assigned for hearing on the 13th day of January, 1941. The case

was afterward reassigned for argument on February 17, 1941, as appears from the order at page 221 of the record. On that date the petitioner announced itself ready for hearing on the motion for summary judgment and the matter was argued, as appears from the order at page 222 of the record.

The District Court entered judgment upon the motion for summary judgment and sustaining the same on February 3, 1942 (R. 285), and also made certain findings of fact and conclusions of law (R. 280-285).

Petitions for rehearing were filed by petitioner, in various forms, which were disposed of by an order entered by the District Court on April 29, 1942 (R. 325), and on July 20, 1942, petitioner gave its notice of appeal to the Circuit Court of Appeals from the judgment of the District Court entered on the 29th day of April, 1942, which was the order denying the rehearing and not the judgment sustaining the motion for summary judgment (R. 327).

It will be noted from the findings of fact and conclusions of law of the District Court (R. 280 *et seq.*), that that court held that petitioner's action was barred by the judgment of the Pike Circuit Court above referred to, as well as by the various statutes of limitations referred to. See conclusions of law, page 285 of the record.

Upon the appeal to the Circuit Court of Appeals for the Sixth Circuit, that Court, on June 1, 1943, handed down an opinion affirming the judgment of the District Court. This opinion is reported in 137 F. 2d 871 *et seq.* Subsequently, petitioner filed a petition for rehearing, and this petition was denied on the 31st day of August, 1943, and the petition for certiorari, now under consideration, followed, filed in this Court on the 30th day of November, 1943.

PETITIONER'S GROUNDS

The petitioner, at page 3 of the petition, states under a heading "Questions Presented" and at page 5, "Reasons for Granting the Writ."

These questions presented and supposed reasons for granting the writ are derived from the argument made by petitioner in the brief, beginning at page 14, and for the purpose of this brief, we will confine it to the discussion of the points made in that argument, with the belief that if these points appear to be without merit, there will be no basis for the petitioner's application.

In the opinion of the Circuit Court of Appeals, written by Judge Hamilton, that court confined its consideration to the one question of the bar of petitioner's action by the judgment of forfeiture of the Pike Circuit Court, and did not consider the bar of the statute of limitations under Section 251 of the Kentucky Constitution. The opinion of Judge Hamilton is so full, lucid and well-reasoned and supported by authority, that it would seem to afford a complete answer to the contentions petitioner makes in its argument, and it will only be necessary for us to briefly present our views in answer to each of the points raised by petitioner in the argument filed herein, beginning at page 14 of the brief.

ARGUMENT

I.

The Judgment of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Kentucky, is Based Upon Uncontroverted Facts.

Petitioner argues at some length that a motion for summary judgment will not be granted where it is based upon controverted facts. It will be noted from the opinion of Judge Hamilton that this contention of petitioner is conceded. There are no controverted facts, however, in regard to the effect of the forfeiture judgment of the Pike Circuit Court. The judgment rendered in this case therefore depends entirely upon an interpretation of that judgment and not upon any finding of fact in regard thereto upon disputed evidence. The Circuit Court of Appeals found that there was not any genuine issue as to any material fact, and in so far as the bar of this judgment of the Pike Circuit Court is concerned, there could not well be any disputed fact. The judgment was set up as a bar to the suit, and petitioner sought to avoid the effect of the judgment by collaterally attacking the same, claiming that it was absolutely void, and the only question was whether or not this attack was meritorious.

II.

The First Ground of Attack Made by Petitioner Upon the Judgment of Forfeiture is That the Procedural Requirements of the Statute of Kentucky Were Not Complied With, in That the Petition Upon Which the Forfeiture Judgment Was Based Was Not Posted as Required by Law, or, Rather, That There Was no Clerk's Certificate Endorsed Thereon Showing That it Was Posted.

It may be well here to point to the holdings of the Court of Appeals of Kentucky in regard to collateral attacks upon judgments of courts of general jurisdiction. The law, as declared in Kentucky, is well expressed in *Mussman* v. *Pepples*, 232 Ky. 254, 22 S. W. (2d) 605, as follows:

> "There are certain well-defined principles of law applicable to the facts of this case. A judgment of a court of general jurisdiction cannot be collaterally attacked either in the court rendering the judgment, or in any other court unless the judgment be void. Oliver v. Belcher, 205 Ky. 417, 265 S. W. 942; Willis v. Tomes, 141 Ky. 431, 132 S. W. 1043. A direct attack on a judgment can only be made in the manner pointed out in Civ. Code Prac. Secs. 344, 414, and 518, or by appeal, *and any other attack is a collateral attack.* Logsdon v. Logsdon, 204 Ky. 104, 263 S. W. 728; Gardner v. Howard, 197 Ky. 615, 247 S. W. 933; Johnson v. Carroll, 190 Ky. 689, 228 S. W. 412. To warrant a collateral attack on a judgment of a court of general jurisdiction, want of jurisdiction *must appear on the record, and a pleading that merely alleges the absence of jurisdictional facts is not sufficient.* It must go *further and allege that the record actually shows the absence of the jurisdictional facts.* Johnson v. Carroll, supra; Ratliff v. Childers, 178 Ky. 102, 198 S. W. 718. It is also the rule that such a judgment cannot be attacked outside the record, although the record does not on its face show the jurisdictional facts. Anderson's Committee v. Anderson's Administrator, 161 Ky. 18, 170 S. W. 213, L. R. A., 1915C, 581."

The petitioner's contention is that the judgment of forfeiture is void because it does not appear from the record that the petition was posted at the front door of the court house as required by statute. Judge Hamilton, in the opinion handed down by the Circuit Court of Appeals, pretty fully discussed this question. In addition to the

matter alleged by Judge Hamilton, we call attention to the following:

Petitioner's contention is that it does not appear that the clerk endorsed upon the petition the fact that he posted it as required by law, and at the top of page 18 of its brief, the startling statement is made that it is the endorsement of this fact on the petition that gives the court jurisdiction and not the posting. In other words, petitioner's novel contention is that the thing which gives jurisdiction to the court in a lawsuit is the fact that somebody says that service of process has been had, regardless of whether or not it is true. The conclusion of the Circuit Court of Appeals is that the thing which gives jurisdiction is the service of process.

The petition in the forfeiture suit appears at page 36 *et seq.* of the record. Bearing in mind the doctrine that all reasonable inferences are in favor of the validity of a judgment of a court of general jurisdiction, we find by examination of the record that the clerk, immediately upon the fiilng of the petition, entered a warning order (R. 55), and on page 56 we find his endorsement certifying that the petition was filed June 3, 1907, signed by the clerk by his deputy, and immediately following this the statement that the petition in equity was filed on the ..... day of ....., 1907 (reading of the above endorsement would make it read June 3, 1907), and immediately posted a copy of the petition and exhibits thereto attached at the front door of the court house in Pikeville, Kentucky. The clerk did not state the time at which he posted it. This endorsement, it is true, is not signed by the clerk. The statute does not provide that it shall be signed by the clerk. It only provides that the clerk shall endorse on the petition that it was filed and that he immediately posted it, and this the record shows was done by the clerk's certificate.

In addition to this, the warning order attorney, who was a sworn officer of the court, sent a statement to each of the defendants, advising of the filing of the petition and of the effect thereof, and in this statement (R. 74) he makes the statement that "in accordance with the provisions of said Article, there is posted at the front door of the court house in Pikeville, Kentucky, a copy of said petition and all exhibits." This statement of his is under date of June 5th, only two days after the petition was filed. So that we have the endorsement of the clerk on the petition that he posted it immediately after its filing on June 3rd, and we have the certificate of the warning attorney, acting under his oath of office, on June 5th, that the same was posted in accordance with the provisions of law.

We therefore conclude that the record affirmatively shows not only that the petition was posted, but that an endorsement to that effect was made thereon.

III.

The Judgment of Forfeiture of the Circuit Court of Pike County, Entered February 14, 1908 (R. 127), Was a Final Judgment and Deprived the Claimants of the Title to the Haskell Patent of all Interest Therein.

The effect of the judgment of forfeiture in this case and the finality thereof is clearly prescribed by the law, and this is contained in Section 4076d, Carroll's Kentucky Statutes, Edition of 1936, which section is printed as Appendix No. 1 to this brief. This section provides the machinery for such proceedings, and then it declares that the court shall render judgment in accordance with the pleadings, exhibits and evidence adduced upon the trial which is had upon the petition, and then it declares the effect of such a judgment to be that the title or claim sought to be forfeited is forfeited and vested in the Commonwealth, and that such judgment shall operate as

a transfer to and vesting in the Commonwealth of the said title and claim of each and all of the defendants and those under whom they claim, without execution of deed or other instrument. There could not be a clearer declaration of the effect of the judgment and the finality thereof. All that follows is simply the execution of the judgment.

The fact, too, that the Court of Appeals of Kentucky, in which only final judgments will be reviewed, and the Supreme Court of the United States, in which only final judgments will be reviewed, did review the judgment entered in this case, indicates the views of those courts as to its finality. It would seem, however, that the statute itself it conclusive thereof.

Petitioner also complains that a copy of the judgment of forfeiture was never recorded in the County Clerk's office. Assuming that this is true, this in no wise affected the validity of the judgment, as stated by Judge Hamilton in the Court's opinion, at pages 352-353 of the record. It would constitute only a ministerial act designed for the protection of innocent purchasers. There is no showing here that petitioner was an innocent purchaser. Under the law of Kentucky, as construed by its court of last resort, one to be a bona fide purchaser must aver and prove payment of a valuable consideration and positively negative notice or knowledge.

Wing v. *Hayden,* 10 Bush 276;

Deskins v. *Big Sandy Co.,* 121 Ky. 601, 89 S. W. 695;

Long v. *Howard,* 229 Ky. 369, 17 S. W. (2d) 207.

Whatever may be the fact in regard to the recordation of the judgment in the County Clerk's office, petitioner is in no position to complain thereof until it first shows that it was a bona fide purchaser for value, and affirmatively and positively shows that it had no notice of the judgment at the time of the purchase. In this respect it has entirely failed.

IV.

The Validity of the Forfeiture Judgment of the Pike Circuit Court Was Not Affected by the Attempted Repeal of the Statute in 1938.

As before noted, under the statute of Kentucky upon which this forfeiture judgment was based, the judgment was final and complete and all title vested in the Commonwealth upon entry of that judgment. It necessarily follows from this that a subsequent repeal of the statute did not affect the validity of a final judgment, and the petitioner's argument upon this question is based entirely upon the assumption that the judgment of forfeiture was not a final judgment.

V.

Sections 56 and 57, Kentucky Code of Civil Procedure, Provide Alternate Remedies for Acquiring Jurisdiction Against Non-Residents.

This question is so completely disposed of by Judge Hamilton, in the opinion of the Circuit Court of Appeals, that little need be said in regard thereto. The learned District Judge, as well as the long-experienced Judge of the Circuit Court of Appeals who wrote the opinion in this case, were entirely familiar with the construction placed upon these statutes, and while there has never been any determination by the court of last resort of the Commonwealth of Kentucky in regard thereto, still, as Judge Hamilton states in his opinion, it has been the uniform practice of the bar of Kentucky to treat these sections as providing alternate remedies, and that jurisdiction might be acquired by proceeding under either of them.

The petitioner's statement on page 24 of the argument would convey the impression that one of these sections provides for acquiring jurisdiction of non-residents whose

place of residence is known, and the other of non-residents whose place of residence is not known.

Section 56 provides for sending out of the State and serving process in a case where the residence of the non-resident is known, and it is effective to confer jurisdiction.

Section 57 provides for constructive service of warning order, not only on unknown non-residents, but upon non-resident corporations, of non-resident persons, a person who has left the State to defraud, one who is absent from the State four months, one leaving the county to avoid service, and one concealing himself to avoid service. In all of these cases, proceedings may be had under Section 57, and clearly the court's construction of this is right, particularly taken in view of the fact that it has been the uniform interpretation placed upon these sections by the bar of Kentucky ever since their enactment, as stated by Judge Hamilton in the opinion of the Circuit Court of Appeals.

VI.

The Forfeiture Judgment Transferred All Right, Title and Interest of the Claimants of the Haskell Patent to the Commonwealth.

Section 4076d, Carroll's Kentucky Statutes, Edition of 1936 (which section is quoted in Appendix No. 1 hereto), prescribes the effect of such a judgment. The statute requires that the petition shall exhibit a copy of the patent under which the defendants therein claim, and then provides that if the judgment is one of forfeiture, it shall transfer and vest in the Commonwealth the title and claim of each and all of the defendants to the patent, wherever the same may be located. In order to give the court jurisdiction, it was necessary to show that the land lay at least partly in the county wherein the suit was brought, and this was the only purpose of describing the land as

partly in Pike County. The effect of the judgment, however, after it was rendered, was as broad as the State and forfeited every right which the defendants had in any county in the State, the jurisdiction of the court having once attached upon a showing that a certain part of the lands lay in Pike County. The opinion of the Circuit Court of Appeals very satisfactorily disposes of this question.

VII.

The Judgments of the Court of Appeals of Kentucky and of the Supreme Court of the United States are Adjudications of the Finality of the Judgment of the Pike Circuit Court Which Was Under Review.

Petitioner makes the claim that the judgments of the Court of Appeals of Kentucky and of this Court, affirming the forfeiture judgment, are of no effect in this case. We cannot assent to this proposition in its entirety. The jurisdiction of the Court of Appeals of Kentucky is limited to reviewing final judgments. Likewise, the jurisdiction of this Court is limited to the reviewing of final judgments. And the very fact that the Court of Appeals of Kentucky and this Court took jurisdiction and did review the judgment, is an adjudication that the same was a final judgment.

VIII.

The Payment of Taxes During the Five Years Involved in the Forfeiture Proceeding Was the Very Question Which the Pike Circuit Court Tried, and it is Not Now Subject to Review by a Collateral Attack on That Judgment.

A reference to the record will show that a trial was had before a jury. The evidence taken upon this trial was directed largely to this very question as to whether or not any taxes had been paid upon this patent (R. 88 *et seq.*).

The verdict of the jury was that no such taxes had been paid. This verdict was carried into judgment, and this adjudication by a court having jurisdiction of the subject-matter is final and conclusive, particularly against a collateral attack such as is made here.

In this brief we have not undertaken to discuss elaborately the various points made, but we invite the Court's attention to the very complete, lucid and well-reasoned opinion of the Circuit Court of Appeals, which is found at pages 335-401 of the record and reported in 137 F. 2d 871.

Petitioner in its petition, on page 8, paragraph V of its "reasons for granting the writ", and on page 11 of its brief under "statement of facts", complains that Robert Boyd was not made a party defendant to the proceeding, and asserts that the petition filed in the forfeiture proceeding in Pike County affirmatively shows that Robert Boyd was an owner of at least part of the title at the time of the filing of the petition. This statement is a misrepresentation of the facts stated in the petition. The pertinent parts of the petition will be found at page 40 of the record, and there states that on the 20th day of March, 1902, by deed recorded in Deed Book No. 24, at page 54, Pike County Court Clerk's Office, Boyd conveyed all of his interest to Robert Fletcher Rogers, and that there is no record that Rogers had ever conveyed the same or any part thereof.

In the next paragraph of the petition it is stated that on October 2, 1905, one George H. Taylor, without exhibiting any authority except the statement that he is the son of Maria Taylor of Norfolk, with the further statement that this deed was made after a deed from Maria A. Taylor to one William H. Jonas, who was the source of Boyd's claim which he had conveyed, as stated in a former paragraph, in 1902 to Rogers. So that the record shows clearly that at the time the petition was filed, Boyd had no title whatever to any interest in the land.

Judge Hamilton, in his opinion on rehearing, at page 402 of the record, disposes of this question very satisfactorily, except that it is there stated that the deed from Robert A. Boyd to Robert Fletcher Rogers was dated March 20, 1908, instead of March 20, 1902, as appears from the petition.

The petition calls attention to the amount involved as being proper to invoke the jurisdiction of this Court. All of the injury claimed is by the extraction of natural gas from the premises by this respondent. In the petition in this case, petitioner fixes its damages at $70,466,900.00, a purely fantastic amount. In the petition which it filed before the Securities and Exchange Commission, it deemed it necessary to more fully state the extent to which this respondent had developed the land by the production of natural gas. At page 19 of the record, the statement is made that approximately 50,000,000 cubic feet of gas has been extracted by this respondent, which was worth at wholesale 26 cents per thousand cubic feet, or a total of $13,000.00, or 50 cents at retail, or a total of $25,000.00. This statement was sworn to by the Secretary and a Director of the petitioner, and is very much nearer the fact than the fantastic amount claimed in the complaint.

It appears from the statements filed following page 12 of the record, that this respondent claims oil and gas leases on 26,855.13 acres upon which it has drilled. It certainly is a fantastic claim that this extent of acreage, even at its full value, was worth any such amount as is claimed by petitioner.

THIS SUIT IS BARRED BY THE PROVISIONS OF SEC. 251 OF THE CONSTITUTION OF KENTUCKY.

The District Court sustained the motion for summary judgment upon two grounds: (1) that the suit was barred

by the judgment of forfeiture entered in the Circuit Court of Pike County in the case of *Commonwealth of Kentucky* v. *Eastern Kentucky Coal Lands Corporation, et al.*, on the 14th day of February, 1908; and (2) that the same was barred by the statute of limitations under Section 251 of the Kentucky Constitution (court's opinion, R. p. 275, and findings of fact and conclusions of law, R. p. 280-285).

The Circuit Court of Appeals dealt only with one of the grounds upon which the lower court's judgment was based, and having concluded that this ground barred the plaintiff's right to recover, affirmed the judgment of the District Court without adverting to the application of the statute of limitations provided by the Kentucky Constitution, Section 251. This failure of the Circuit Court of Appeals to notice the application of the statute of limitations, above referred to, does not prevent this court from considering that ground as one justifying the judgment of the District Court.

In the case of *Helvering* v. *Gowran*, 302 U. S. 238, 82 L. ed. 224, Mr. Justice Brandeis, at page 245 of the official report, page 230 of the L. ed., stated the law to be that:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."

This doctrine is fully supported by the following authorities:

United States v. *Holt State Bank*, 270 U. S. 49-56, 70 L. ed. 465-469;

Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208, 65 L. ed. 892;

Stelos Co. v. *Hosiery Motor-Mend Corp.*, 295 U. S. 237, 79 L. ed. 1414;

Langnes v. *Green*, 282 U. S. 531-536, 75 L. ed. 520-524;

Letulle v. *Scofield*, 308 U. S. 415, 84 L. ed. 355;

United States v. *American Ry. Express Co.*, 265 U. S. 425-435, 68 L. ed. 1087-1093.

Authorities on this point might be indefinitely multiplied, but those above cited are sufficiently illustrative.

Section 251 of the Kentucky Constitution is:

> "No action shall be maintained for the possession of any lands lying within this state, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the Commonwealth of Virginia, or by the Commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any person claiming such lands by possession to a well defined boundary, under a title of record, unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession; but nothing herein shall be construed to affect any right, title or interest in lands acquired by virtue of adverse possession under the laws of this Commonwealth."

In this case the plaintiff relies upon a patent issued to Benjamin Haskell by the Commonwealth of Virginia on the 15th day of February, 1797 (R. p. 57). It will appear from this patent that the case is brought clearly within the provisions of Section 251 of the Constitution of Kentucky above quoted, which bars any suit to recover thereon in five years after the occupant may take possession. The construction of this provision and its application fully appears from the case of *Warfield Natural Gas Co.* v. *Ward*, 286 Ky., 73-80, etc.

The defendant advanced as one of its grounds for summary judgment the bar of this statute of limitations and, in support thereof, relied upon the admissions of the plaintiff in its complaint filed herein (R. p. 1), and the admissions of the plaintiff contained in a pleading filed by it before the Securities and Exchange Commission in a proceeding pending before that Commission in which War-

field Natural Gas Company was one of the parties, in which proceeding the plaintiff in this suit sought to intervene (R. pp. 13, 19 and 20), and upon a number of affidavits filed and served upon the plaintiff on December 16, 1940 (R. pp. 220, 221). The court set the case down for hearing on February 17, 1941, and on that date the parties announced themselves ready (R. p. 222), and the plaintiff filed certain counter-motions and affidavits. The hearing was not completed at that time, and on April 10, 1941, the plaintiff filed certain other motions and affidavits (R. p. 261), and on May 23, 1941, the plaintiff filed another affidavit, and on May 26th certain other matter. On December 3, 1941, the court passed upon the motion (R. p. 275), and on February 3, 1942, entered its final judgment sustaining the motion and dismissing the cause.

It will thus be seen that practically a year elapsed from the time the defendant's motion for summary judgment, accompanied by affidavits and other papers, was served on the plaintiff until the court finally decided the case.

In presenting this question, we call the court's attention first to the admissions of the plaintiff contained in the complaint filed in this case (R. p. 1), and in the pleading filed before the Securities and Exchange Commission (R. pp. 13, 19 and 20). These admissions are evidence of the very highest character. The petition filed before the S. E. C. was verified by the oath of an officer of the plaintiff and, of course, carries such additional weight as the oath of this officer may import. That such admissions are evidence of a very high character, cannot be doubted.

In *Pope* v. *Allis,* 155 U. S. 363, 29 L. ed. 393, at page 371 of the official report and page 397 of the L. ed., the court said:

> "When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a

solemn admission by him of the truth of the facts stated."

White v. *Mechanics Security Corp.*, 269 U. S. 283-302, 70 L. ed. 275-280.

The plaintiff in its complaint in this case (R. p. 2) avers that the defendant entered upon its real estate in 1930 and committed trespasses thereon by the construction of gas wells and producing gas therefrom, and has continued in that possession and in that commission of acts of trespass, up to the date of the commencement of the suit, which acts of trespass it avers was to its damage in the sum of $70,466,900.00. This averment brings the plaintiff's suit clearly within the bar of Section 251 of the Constitution of Kentucky above quoted.

In the pleading filed by the plaintiff before the Securities and Exchange Commission, which was sworn to by the Secretary and a Director of the plaintiff on the 2nd day of February, 1940, the plaintiff alleges that it employed an engineer in 1932 to make an examination of the property claimed by it for the purpose of determining the trespassers thereon, and that it found 286 gas wells upon the property claimed by various companies named in said pleading (R. p. 19); that of these wells some 200 were owned and operated by this defendant, either under lease agreements from the purported owners of said properties on which the said wells were located, or by reason of purported land deeds held by said Warfield Company; and that this defendant has engaged in the continuous ownership and operation of said wells and has drilled more wells upon said lands since the year 1931, and has taken, between the years 1933 and 1940, a total of approximately 50 million or more cubic feet of gas, which was worth 26 cents per thousand cubic feet wholesale and approximately 50 cents per thousand cubic feet at retail.

On page 20, it avers that on July 23, 1931, it notified the defendant that it (the defendant) was trespassing upon

plaintiff's properties by maintaining and operating said gas wells and pipe lines, and that on September 8, 1931, the defendant repudiated the plaintiff's title and denied that it had any right to the lands and refused to recognize its claim.

In this pleading the plaintiff is very specific as to the acts that this defendant has been guilty of and as to the result thereof. It will be noted that it is averred that it has extracted from the said lands 50 million or more cubic feet of gas, which was worth at wholesale 26 cents, or a total of $13,000.00, and at retail 50 cents, or a total of $25,000.00. This statement of the plaintiff is more nearly the fact than its claim of $70,000,000.00 in its complaint, and makes it manifest that the extravagant sum claimed in the complaint is no more than a front to convey the impression that the plaintiff's claim is of immense value.

It will be noticed in these pleadings that the plaintiff avers that much more than five years before the institution of the suit on May 9, 1940, the defendant was in possession of the lands or interest in lands which it now claims, and not only this, but that the plaintiff was fully advised thereof and fully advised that the defendant denied its title or claim of title thereto; and, notwithstanding these facts, it waited until 1940 to bring suit, at which time the bar of the Kentucky constitutional provision had run against it. It is significant, too, that while the motion for summary judgment was served on the plaintiff on December 16, 1940, with which was included this pleading, and was not decided by the court until December, 1941, almost a year, the plaintiff never, during that time, offered any explanation or excuse for the admissions and averments in its pleadings above referred to.

In support of these judicial admissions made by the plaintiff, this defendant filed with its motion for summary judgment certain affidavits and supporting papers. It

filed a list showing the property in which it claimed an interest by leases from the owners thereof, giving the name, the lease number, the date of each lease, the deed book, page and date of record, postoffice addresses of the lessors, and where the ownership of the land had been changed, the name of the new owner, the date of such change and the address of such new owner, the number of acres contained in each lease, the number of wells drilled and the date on which each well was drilled and completed, and the source of title of the defendant's lessor, including the date of his deed and the place of record. (Record following p. 12). This information covers 22 pages and is in a form as convenient and brief as it could be set forth. It affords by reference an available description of each tract leased. To incorporate a complete copy of each lease would have been an unnecessary burden, both on the court and the defendant. It is a rule of law that a description is certain which may be made so. *Tichenor* v. *Wood*, 70 S. W. 837. Each of these tracts of land is claimed and held to the extent of the boundaries defined in the title papers, incorporated by reference to Exhibit "A", which gives a definite, certain and complete identification of every boundary on which it has a well or wells or has extracted gas or oil, or is holding under lease.

In addition to this, the defendant filed the affidavits, in most cases, of the owners of the several tracts of land, and in other cases, of parties familiar with the facts, showing the possession of each of these parties of the tracts of land claimed by them, for a great many years. These affidavits are found at pages 140 and following of the record. They are specific in their statements and show that each of the claimants under the deeds referred to were then in possession of their land and had been for many, many years prior to the time the plaintiff ever became interested therein.

All of these affidavits were served on the plaintiff on December 16, 1940. It makes no effort to deny a single specific statement made by any of the affiants. It does not say that in the case of a single one of the affiants the statements made by them are not exactly correct, nor is there a statement in any of the plaintiff's defenses that indicates that it is in possession or ever had any possession of any of the tracts of land in which the defendant claims an interest. All that the plaintiff does is to say that there has been no possession adverse to it except by squatters, and that it or some of its agents were upon the land some thirty years before the suit was brought. The denials of possession by the plaintiff was put in such form by the qualification of possession only by squatters, as to avoid a charge of perjury.

The plaintiff admits that the map at page 137 of the record correctly represents the territory claimed by it. It will be noted that on this map the City of Pikeville is included within this area. The courts judicially know that Pikeville is the county seat of Pike County, Kentucky, and is one of the places at which the United States District Court for the Eastern District of Kentucky sits regularly, and the District Court was entirely justified in its finding at page 284 of the record, that:

> "The defendant filed a large number of affidavits in due and proper form, and the Court finds that the defendant, and its lessors are now, and for more than fifteen and for more than thirty years next preceding the commencement of this suit, have been continuously in the actual, open, notorious, exclusive, peaceable, uninterrupted, hostile and adverse possession of the lands identified and listed in Exhibit 'A' filed with its answer, and being all the lands involved in this case. Copies of the said affidavits were duly served upon plaintiff prior to the 16th day of December, 1940, *and no affidavit or other evidence to contradict any of the facts stated*

therein have been offered, and no showing that such evidence was available or in existence, and this cause was submitted on the Motion for Summary Judgment by agreement on the 2nd day of September, 1941."

It is hard to conceive, from a consideration of the record, how the District Court could have reached any other conclusion than that the facts making applicable the statute of limitations of five years were not in dispute.

The Circuit Court of Appeals Should Have Dismissed the Appeal for Lack of Jurisdiction.

On page 334 of the record there is a motion on the part of Warfield Natural Gas Company to dismiss the appeal, upon the ground that the same was taken from the order of April 29, 1942, being the order denying the rehearing, and that no appeal was ever taken from the final judgment rendered on February 3, 1942.

The order of April 29, 1942, from which the appeal was taken, appears at page 325 of the record, and the final judgment appears on page 285 of the record.

The court, by an order entered on February 9, 1943, passed this motion until final hearing, but on the final hearing did not notice the same. The order of April 29, 1942, appealed from, was not an appealable order.

Willis v. *Davis,* (6CCA) 184 Fed. 889;
Connor v. *Peugh,* 18 How. 394;
Conboy v. *First National Bank,* 203 U. S. 141;
Wayne United Gas Co. v. *Owens Illinois Glass Co.,* 300 U. S. 131.
Jones v. *Thompson,* (CCA8) 128 F. 2d 888.

These authorities, as well as many others, clearly make manifest the conclusion that the order appealed from was not an appealable order, and no appeal having been taken within the time provided by law, or at any other time, from

the final judgment entered February 3, 1942, the Circuit Court of Appeals should have sustained the motion to dismiss instead of proceeding to a decision of the cause on its merits.

It is respectfully submitted that there is no ground for granting the writ.

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APPENDIX NO. 1.

SECTION 4076d, CARROLL'S KENTUCKY STATUTES, 1936 EDITION:

"If any such owner or claimant shall fail to have said land assessed, or fail to pay the taxes charged, or which should have been charged against him, or those under whom he claims, as the owner or claimant of any such tract of land, as provided and within the time prescribed in Section 4076b and 4076c of this article, together with the penalties and interest as provided by law, then it shall be the duty of the Commonwealth's attorney to institute in the circuit court of the county in which said land or any part thereof lies, a proceeding in equity, in the name of the Commonwealth of Kentucky as plaintiff against said tract of land, and the owners or claimants of said land as defendants, naming them if their names are known to him, and if their names are unknown to him, designating them as the unknown owners and claimants thereof, for the purpose of declaring the title or claim of said defendants forfeited to this Commonwealth, and selling same. The suit so instituted shall be proceeded with to final judgment in all respects as other equity causes so far apppli-cable.

"In addition to the requirements of the Civil Code of practice respecting process and service thereof, notice shall be given of the pendency of said action by posting a copy of the petition at the front door of the courthouse, which shall be done by the clerk immediately after the petition is filed, and he shall show by endorsement upon the original petition the time at which said copy was so posted. The defendants shall not be required to answer until after the expiration of thirty days from the posting of said copy. And such copy, when so posted, shall be deemed sufficient notice to all the defendants of the pendency of said action and its object.

"The petition of the plaintiff shall allege the facts constituting the cause of forfeiture under the provisions of this article, and there shall be filed with it a copy of the grant or instrument upon which the title or claim sought to be forfeited is based; and no other title, claim or possession, or continuity thereof, whether owned or claimed by the defendant or by others, shall be forfeited or in any manner affected by said proceeding. The prayer shall be for a judgment of forfeiture and sale of the title or claim in the petition described.

"The court shall render judgment in accordance with the pleadings, exhibits and evidence adduced; and if it shall find that said title or claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, it shall render judgment declaring the same forfeited and the title thereto vested in the Commonwealth. Such judgment shall operate as a transfer to, and vesting in, the Commonwealth of the said title and claim of each and all the defendants, and those under whom they claim, without execution of deed or other instrument. If the court shall find that the same is not subject to forfeiture under the provisions of this article, then it shall so adjudge and dismiss the petition of plaintiff.

"Judgments rendered by the circuit court under this article shall be conclusive as against all defendants, including infants, lunatics and married women, as to their title or claim derived through or under the grant, title or claim described in the petition; and said judgments and the proceedings upon which they are based shall not be subject to the provisions of Civil Code Sections 391, 410, 414 or 574. Issues as to whether or not the title and claim sought to be forfeited is or has been subject to forfeiture under the provisions of this article, shall be triable by jury; and the judgment of the court shall be in accordance with the verdict, as in ordinary actions.

"Either party may prosecute an appeal from such judgment to the court of appeals within thirty days after the same may be entered; but if any such appeal be prosecuted, the transcript of the record shall be filed in the court of appeals within sixty days after the entry of said judgment; and the hearings upon appeal shall have the same precedence as other Commonwealth cases. No bond on appeal shall be required of the Commonwealth."

APPENDIX NO. 2.

SECTION 251, KENTUCKY CONSTITUTION:

"No action shall be maintained for the possession of any lands lying within this state, where it is necessary for the claimant to rely for his recovery on any grant or patent issued by the Commonwealth of Virginia, or by the Commonwealth of Kentucky prior to the year one thousand eight hundred and twenty, against any person claiming such lands by possession to a well-defined boundary, under a title of record, unless such action shall be instituted within five years after this Constitution shall go into effect, or within five years after the occupant may take possession; but nothing herein shall be construed to affect any right, title or interest in lands acquired by virtue of adverse possession under the laws of this Commonwealth."

(40)

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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REPLY OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ARGUMENT.

I.

A summary judgment proceeding can never be sustained where there is a controverted question of fact and if it becomes necessary for the Court to weigh the evidence the motion for the summary judgment must be denied.

Respondent states the decision below conceded the above

to be a correct statement of the law but that there were no controverted facts regarding the forfeiture judgment.

The language of the court below, namely, "fairly weighing the evidence in the record of the posting of the notice * * *" means precisely what was said. The court obviously recognized plaintiff's point, that there was no posting of the notice. Plaintiff's position is that this should have ended the matter and the court should have held the Pike County forfeiture proceedings null and void and subject to collateral attack. However, the court took into consideration what it regarded as other evidence of the posting of the notice which plaintiff contends was incompetent and immaterial. The court below then proceeded to weigh the evidence and after "fairly weighing the evidence" reached the conclusion the notice was "duly posted at the court house door as required under the statute." Unless this decision is reversed on this point a deluge of decisions may be expected by the lower courts "weighing the evidence" in summary proceedings.

There were at least three controverted questions of fact decided by the lower court:

1. Defendant filed numerous affidavits on the question of adverse possession (see Defendant's Exhibit 9-27, Tr. 140-218). Plaintiff filed counter affidavits of J. J. Johnson (Tr. 232-241) and Nels T. Arvidson (Tr. 256-261). Every contention of defendant relative to adverse possession was controverted. None of defendant's affidavits refer to adverse possession by anyone at the time of the forfeiture proceeding which was filed in 1907, but plaintiff's and defendant's affidavits are contradictory and show genuine issues on material facts relative to possession for the

period of 15 years prior to the filing of plaintiff's suit on May 9, 1940. If adverse possession was at any time of the slightest consequence respecting the forfeiture, then adverse possession was a controverted question of fact.

2. We do not regard the posting of the publication notice as a controverted question of fact, but it was made so by the court below, and after having been made so, the court weighed the evidence and decided there had been a posting which amounted to a decision of a controverted question of fact.

3. Defendant recognized the importance of the language used by the Court of Appeals of Kentucky respecting the payment of taxes and filed in support of its summary motion two affidavits—one of John D. Thomas (Defendant's Exhibit 26, Tr. 205) and one of Gomer C. Sturgill (Defendant's Exhibit 28, Tr. 219) for the purpose of showing taxes had not been paid upon the Haskell Grant. Plaintiff filed the counter affidavits of J. J. Johnson (Tr. 232-241); Roy C. Holbrook (Tr. 242-255) and Nels T. Arvidson (Tr. 256-261), showing taxes had been paid on the Haskell Grant for at least three years of the five year statutory period. These affidavits were substantiated by records of the Auditor's office of Kentucky (See Exhibits 1 to 6, Tr. 236-241), certified copies of assessment of taxes against the Haskell Grant (see Arvidson's Exhibits 1 and 2, Tr. 254), and a photostatic copy of the original tax receipts for taxes paid on the Haskell Grant (Keel's Exhibit 1, Tr. 261).

Defendant's affidavits of Thomas and Sturgill, in our opinion, did not accomplish the purposes desired, namely, showing non-payment of taxes during the five-year statu-

tory period, but if they did then the question of payment of taxes was a controverted question of fact.

II.

Where a special state statute as to the forfeiture to the state of title in lands for non-payment of taxes prescribes the procedural steps to be taken to legally effect and record such forfeiture, the fact of literal compliance with those prerequisites must appear of record to give the court jurisdiction.

We heartily agree with the decision in the case of *Mussman* v. *Pepples,* 232 Ky. 254, 22 S. W. (2d) 605, to the effect that a collateral attack may be made where want of jurisdiction appears on the record. That is precisely what the record of the Pike County forfeiture proceeding showed in the present case—a lack of jurisdiction because the clerk *did not show by endorsement upon the original petition the time at which the copy was posted at the front door of the court house.*

True it is that the clerk entered a warning order but the entry of the warning order did not supply the requisites of the statute relating to the posting of the notice. Opposing counsel say the clerk did not state the time of the posting of the notice and did not make any endorsement, but draw the ridiculous conclusion that the "statute does not provide that it shall be signed by the clerk but only provides that the clerk shall endorse on the petition that it was posted." This is the plainest kind f double talk. The statute is plain and the clerk ompletely failed to comply with the statute. The self- erving conclusions of the warning order attorney did ot supply the jurisdictional statutory requirement. It

is the return of the designated officer in compliance with the statute which gives the court jurisdiction. If the return does not appear of record, the self-serving legal conclusions of someone else are incompetent and immaterial. The statement of opposing counsel that, "we have the endorsement of the clerk on the petition that he posted it * * *" is not a true statement.

We have yet to be shown any authority that any presumption may be indulged of the court's jurisdiction where the statute requires a record of the proof of publication to be made and no compliance with the statute appears of record.

III.

Where a special statute requires the recording of a forfeiture judgment and a sale for cash and an accounting to the owner of record, the mere rendering of the forfeiture judgment without recording and without sale and without accounting to the owner, does not divest the owner of his title and interest in said land, nor can such judgment be set up as a bar to the owner or one holding through him to assert his rights of ownership in the land.

The cases cited on page 9 of defendant's brief are cases under Section 496 of the General Statutes of the State of Kentucky and not decisions under the Forfeiture Statute. Again, opposing counsel overlook that the Forfeiture Statute was a special statute complete in itself and that the General Statutes of Kentucky had no application except where specifically made so by reference. The difference between the requirements of the Forfeiture Act respecting recording and indexing of the forfeiture judgment and Section 496 of the Kentucky Statutes relative to validity of unrecorded deeds is apparent. The for-

feiture judgment had to be indexed and recorded to give it validity while an unrecorded deed under Section 496 of the General Kentucky Statutes is valid except as against a purchaser for value without notice.

IV.

Where a special statute of forfeiture to the state of title in lands for non-payment of taxes prescribes a series of procedural steps to be taken to effect and record such forfeiture, and that statute is repealed before all of such steps have been taken, without a saving clause in favor of pending actions, any judgment rendered under the repealed statute may not be set up as a bar to the right of the owner, or one holding title through such owner, to assert his right of ownership in the land.

The prayer for relief in the forfeiture petition was that the tracts of land be forfeited and if not purchased back "be sold in manner provided by Article III aforesaid." Obviously, the forfeiture proceeding was not prosecuted to its ultimate conclusion by the entry of the forfeiture decree. Again, counsel for defendant overlook that the forfeiture statute was a special statute requiring "a judgment of forfeiture and sale," and that the "court rendered judgment in accordance with the pleadings." (Sec. 3, Art. III).

In *Vance* v. *Rankin*, 194 Ill. 625, in which case the decisions of many States are discussed, the court said:

> "It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect it cannot be after. *South Carolina* v. *Gaillard*, 101 U. S. 433. * * * Pending judicial proceedings based upon a statute cannot

> proceed after its repeal. * * * This rule holds true until the proceedings have reached a final judgment. * * * The repeal of a statute conferring jurisdiction takes away all right to proceed thereunder unless it is expressly saved, * * * and except for the purposes of such suits as are begun, prosecuted and concluded while it is an existing law, the statute repealed is as if it never existed. * * * The effect of repealing a statute is to obliterate the prior law as completely from the records as if it had never been passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded while it was an existing law."

Jurisdiction over pending cases is always ousted by the repeal of the statute upon which it wholly depends unless there be a saving clause, and such has been the law as stated by this court on numerous occasions.

Hollowell v. *Commons*, 239 U. S. 506, 36 S. Ct. 202, 60 L. Ed. 409 (affirming 210 Fed. 793).

Hendrix v. *U. S.*, 219 U. S. 79, 31 S. Ct. 193, 55 L. Ed. 102.

Baltimore, etc. R. Co. v. *Grant*, 98 U. S. 398, 25 L. Ed. 231.

V.

Where one section of a statute statute provides for "actual" and personal service upon non-residents whose addresses are known, and another section for "constructive" service upon non-residents whose addresses are unknown, the trial court does not obtain jurisdiction by constructive service of non-residents whose addresses are known.

We are familiar with a rule of law that strong support is found in a practice adopted and followed by the courts

for many years but we are not familiar with any rule of law which would recognize a statement of a judge, that the bar of a certain State has always construed a statute in a certain way. No weight should be given to such a statement.

VI.

The judgment of forfeiture of title limited to lands in one county of the State of Kentucky does not operate to forfeit title to all lands of the same parties defendant in all counties of the state in an action brought under the forfeiture act of the State of Kentucky.

The argument of defendant's counsel misapprehends the well established rule of law which needs no citation of authority that the exercise of jurisdiction and power of jurisdiction are two entirely different things. It may be the Pike County Circuit Court had, under the Forfeiture Act, jurisdictional power to forfeit the entire grant if a portion of it lay in Pike County. The point which we make is, that by the allegations in the forfeiture petition, this jurisdictional power was not invoked but jurisdiction was by the apt language used in the forfeiture petition limited and exercised only as to that part of the Haskell grant lying in Pike County.

VII.

The judgment of this court sustaining the constitutionality of the Kentucky forfeiture statute may not be relied upon as a basis for a factual finding that the judgment of the Pike Circuit Court forfeiting the lands embodied within the Haskell Grant to the Commonwealth of Kentucky was valid in all particulars and that plaintiff and its predecessors in title therefore had no interest in the lands covered by the grant.

The language of Mr. Justice Day quoted in our petition is so clear and precise that it leaves no room for doubt as to what was meant and intended.

VIII.

A judgment in a forfeiture proceeding under the forfeiture act of Kentucky may not be relied upon as constituting a divesting of the property right of the owner of lands with respect to which he has paid the taxes for three of the five years prescribed by the forfeiture act.

We had the right to expect that opposing counsel would discuss the language used by the Court of Appeals of Kentucky which is to the point and conclusive. Since opposing counsel have not seen fit to discuss the point made, our position has been conceded.

CONCLUSION.

What is said, commencing at the bottom of page 14 and ending on page 23 of the argument of defendant's counsel has no proper place at this stage of the proceeding. What is there said is in the nature of a confession and avoidance. The excuse for the argument made, is that the failure of the lower court to pass upon the extraneous matter now injected into this proceeding does not pre-

vent this court from affirming the judgment on any ground it sees fit. We submit this case has not reached the stage when there is anything before this court except the points made in plaintiff's application for certiorari. Defendant is on such uncertain ground that it has attempted to justify the lower court's decision with contentions not passed upon by the lower court. In effect, because of the position taken, defendant invites a review of the whole proceeding and a writ of certiorari should be allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 517

PEN-KEN GAS & OIL CORPORATION,
Appellant,

vs.

WARFIELD NATURAL GAS COMPANY,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Note: All emphasis in this petition for rehearing is supplied.

To the Honorable Chief Justice and the Justices of the Supreme Court of the United States:

The petitioner respectfully presents its petition for rehearing of its petition for certiorari.

The Subject Presented by This Petition for Rehearing.

The final summary judgment of the district court is not authorized by Rule 56 upon which it was based.

That the final judgment was wholly based on Rule 56 as a summary judgment and not on any other ground or procedure is made clear by the opinion of the district court as follows:

> "The ruling here is not made on the case upon final submission on the law and facts. The ruling here is on the defendant's motion for summary judgment. Rule 56." R. 286, folio 300, second paragraph, second sentence. "I repeat that it should be borne in mind that the ruling of the Court here is on the motion for a summary judgment under Rule 56 and not upon a final submission at a final hearing on the law and facts as contemplated by Rule 52." R. 287, at top of page.

The appellate court based its affirmance upon exactly the same Rule 56:

> "Appellant is here insisting that under the state of the record, the court was without jurisdiction to enter a summary judgment dismissing appellant's petition on the above ground." R. 340, first full paragraph.

The Issue.

The case below, in both courts, turned upon a single question. That question was whether pursuant to Rule 56 of the Rules of Civil Procedure a summary final judgment could lawfully be rendered without a trial of the case. By the terms of the rule the determination of that question depended upon whether there existed a "**genuine issue as to any material fact,**" and whether the respondent was "entitled to a judgment as a matter of law".

Also by the terms of the rule the existence of such an issue had to be determined from the "pleadings, depositions and admissions on file, together with the affidavits" and from no other source. No testimony was or could be tendered at any hearing or trial.

The petitioner sued for ejectment with damages. The respondent answered and moved for summary judgment submitting various affidavits. The petitioner submitted counter affidavits. Thereupon the district court entered its judgment at R. 285, folio 299, which incorporated by reference the grounds for the judgment set forth in its Findings of Fact and Conclusions of Law found at R. 280 to 285. The Conclusions of Law on which the judgment was based were that the petitioner was precluded from a recovery (1) by the judgment of forfeiture in the state Pike Circuit Court in *Eastern* v. *Commonwealth*, 217 Ky. 667, affirmed in 219 U. S. 140, and (2) by the adverse possession of the respondent and its grantors or lessors.

The applicable provisions of Rule 56 read thus:

"Rule 56. Summary Judgment.

. . .

(b) For Defending Party. A party against whom a claim . . . is asserted . . . may . . . move with or without supporting affidavits for a summary judgment.

. . .

(c) . . . The adverse party prior to the day of hearing may serve opposing affidavits. **The judgment sought shall be rendered forthwith if** the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, **there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.**

. . .

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

The Importance of a True Observance of Rule 56.

The importance of a proper observance of Rule 56 can scarcely be overemphasized. If its provisions be too broadly interpreted, or if they be disregarded, not only are the parties deprived of a jury trial in a case where they did not waive a jury and did not consent to submission of the issues to the court, but, what is more serious, the nature of the rule is such that if unduly extended it substitutes an essentially summary hearing for a plenary trial.

This case is a good illustration of the impossibility of fully and completely considering all of the true evidence of the parties. Had the affiants who made the many affidavits been subjected to examination on a trial much of what appears therein would have dissipated under its own power or lack of it. For example see the signature of Hylton to his affidavit in respondent's Exhibit No. 14, at the top of R. 159. He has "seen Exhibit A as filed with the defendant's Answer". On the witness stand, if he would ever have appeared there, the court no doubt would on its own motion have rejected him as a witness because his statements, as made in his affidavit, would be worthless.

So with the entire set of twenty "Affidavits as to Possession" submitted by the respondent at R. 140 to 218; they present ultimate facts and after the chaff would be disbursed by cross examination the primary evidence that remained would differ greatly from what is here presented.

The recognized and useful procedure embodied in Rule 56 serves its purpose when the parties are agreed on the essential facts so there remains, in the words of the Rule, **"no genuine issue as to any material fact"**. That is, if the parties are agreed on the facts and desire a declaration of the substantive law on the legal question submitted, they may have it forthwith. But where the parties disagree on the facts Rule 56 has no function.

It is desired now to present an examination of the record in relation to the situation as it existed in the district court on the motion for summary judgment which the court granted on two grounds: (1) that the forfeiture action and (2) adverse possession by the respondent precluded any recovery by the petitioner.

It is submitted that neither of these grounds shut the petitioner out from any recovery but on the other hand the door remains wide open. Many issues of fact still separate the parties.

1.

The Forfeiture Suit Examined.

A careful examination of the effect of the forfeiture suit is essential to a proper consideration of this petition for rehearing because the opinion of the appellate court ends as follows:

> "It is apparent, therefore, that the judgment in question forfeited all of the lands described in the Haskell grant, and by reason thereof appellant has no interest in them. *Oklahoma* v. *Texas*, 273 U. S. 21, 42; *Decker* v. *Tyree*, 204 Ky. 302. The conclusion here reached renders unnecessary consideration of all other issues raised by the parties."
>
> Judgment affirmed." R. 362, top of page.

As will be clearly shown under the heading "The Lands Affected by the Forfeiture Judgment Were Limited to Pike County" a little further on, it is true that all of the Haskell grant was described but **the forfeited lands were but a part of it, namely that part located in Pike County.** This form of description of real estate is quite commonly employed in deeds and mortgages and is in every day use. For example: "All that part lying in the northwest quarter of Section 18 of the following described tract:" followed by a detailed description of a larger tract of which only the part is being conveyed.

Its Geographical Extent.

The Judgment Was Based on the Wrong Case.

In the first place, the district court cited the wrong Kentucky case when it based its summary judgment on the assumed forfeiture of the petitioner's 300,000 acres. It cited the case as "127 Ky. 667, affirmed by the United States Supreme Court, 219 U. S. 140, in which the lands involved here, and the Haskell Grant under which plaintiff claims, were forfeited". That 127 Kentucky case was not a forfeiture case and concerned "tracts of land", claimed under "patents" which are not identified either in 219 U. S. 140, or in the present record. That case was a petition brought by the owner for **assessment** of real estate and not a suit brought by the state. In 219 U. S. 140 the opinion of this court identified it as **Case No. 47** in this court and as 127 Ky. 667 in the state court and described the nature of the original action and named the parties plaintiff and defendant. The Haskell grant was not involved in it.

The Forfeiture Case.

It is another Kentucky case which is involved here and it also is identified by the opinion of this court in 219 U. S. 140, immediately following its reference to the assessment case, as **Case No. 48,** in this court. The opinion says that Case No. 48 was not officially reported in the state reports but is found in 33 Ky. L. Rep. 857. It is described as a forfeiture suit brought by the state which resulted in a judgment "forfeiting the title . . . to lands held in **Pike County**". There can be no doubt on this point. See the record in this pending petition for certiorari at R. 29 to 130 where the present respondent put in as its "Defendant's Exhibit 1" the Transcript of Record in the **Case "No. 48"** as certified by the clerk of this court. (Although the clerk's certificates appear at R. 125 and 126, yet R. 127 to 130 is a part of it, by express references at R. 33 and R. 116 under "*judgment*".) This "Defendant's Exhibit 1" is the transcript of the record in the forfeiture case in the Kentucky Pike Circuit Court and in the Kentucky Court of Appeals which came into this court as Case No. 48 on writ of error. The state records were shown in this indirect manner because the originals were reported to be lost.

The Haskell grant of 300,000 acres which is involved in this present petition for certiorari is identified as being the grant **containing,** among other lands, the Pike County lands which were the sole subject of the forfeiture "Case No. 48" (33 Ky. L. Rep. 857). See R. 2 and also R. 37, folio 46. This confusion of the old state court cases is very important because both courts below based their "forfeiture" conclusions upon the incorrect assumption that the entire Haskell grant of 300,000 acres was forfeited in the Pike Circuit judgment whereas **only that part of the Haskell grant located in Pike County was affected by it.**

No other portion of the Haskell grant of 300,000 except that portion located in Pike County was covered by the forfeiture judgment in the Pike Circuit Court. We proceed to demonstrate this assertion.

The Lands Affected by the Forfeiture Judgment Were Limited to Pike County.

The judgment of the Kentucky Pike Circuit Court in the forfeiture suit is found in the present record at R. 127 to 129, and incorporated in the state court records as certified to this court in the error "Case No. 48", 219 U. S. 140. See R. 33 and R. 116 under "*Judgment*". Its applicable part reads as follows:

> "ORDERS PIKE CIRCUIT COURT FEB. TERM 14 DAY OF FEB. 1908 . . . *Commonwealth of Kentucky* v. *Eastern Ky. Coal Lands Corporation & C. B. Hillhouse Judgment* . . . It is further ordered and adjudged and decreed that the title and claim of each and all of the Defts and those by, through and under whom they claim to the lands in the petition and hereinafter described by, through and under the patents and survey in the petition and hereinafter described be, and the same is now hereby forfeited and said title and claim thereto is now transferred to, and vested in the Commonwealth.
>
> The patents and survey, title and claim under which it is hereby adjudged to be forfeited and adjudged vested in the Commonwealth and lands therein described are as follows, to-wit:
>
> * * *
>
> [this starred omission is that of the Record at R. 128.]
>
> Tract 21. **All that part that is situated in Pike County Kentucky** west of the top of the ridge that divides the waters of the Levisa Fork from the waters of Tug Fork of Sandy River **of that certain tract or parcel of land containing 300,000 acres** by survey bearing date 28 day of November 1795 **which was granted by the Commonwealth of Virginia to Benjamin Haskell . . .**"

Thus it is very clear that the forfeiture judgment pertained only to **that part** of the Haskell grant which is **situated in Pike County.**

The petition for forfeiture sought forfeiture only of lands located in Pike County. It is found at R. 36 et seq., where, at R. 37, the land is described as **"All that part that is situated in Pike County** . . . of that certain tract or parcel of land containing 300,000 acres . . . granted . . . to Haskell." At R. 38 the land is again described in the petition as **"All that part that is situated in Pike County** . . . of that certain tract or parcel of land, containing 300,000 acres . . . granted . . . to Haskell."

The Pike County Circuit Court was not asked, nor did it attempt, to forfeit lands situated outside of that county.

The Map of the Haskell Grant.

The importance of the erroneous assumption that the forfeiture judgment comprised the entire Haskell grant is shown by an examination of the map of the entire Haskell grant at R. 136 which, as explained later in this paragraph is here inserted with the county lines colored green, and may be opened out for examination. The grant includes lands in Kentucky and Virginia within five counties, four of which lie in Kentucky and contain lands claimed by the respondent and colored yellow on the map. R. 135, last paragraph of Cunningham's affidavit. The grant as a whole is wider at the north and narrows toward the south end. **The boundaries between the counties are very indistinctly marked** in the Exhibit A at R. 136 by alternate long and short black lines. —— — —— — —— —. Because it is difficult to follow these boundary lines a copy of the Haskell grant map at R. 136 has been inserted in this petition for rehearing and on it the county boundaries are distinctly

traced in green. The Pike County boundary separates that county mostly from Floyd and Letcher counties and from a little of Knott County. It runs roughly for most of its length from north to south through the middle of the grant between Pike and Floyd Counties and then about two-thirds of the way south turns eastward between Pike and Letcher Counties.

After the Pike County boundary is traced out it is seen that a minor portion of the Haskell grant lies in that county **and a very small portion of the lands claimed by the respondent are found in Pike County.**

So far as the geographical extent of the forfeiture judgment is concerned in the present ejectment suit between the petitioner and the respondent, only that portion of Pike County lands occupied by the respondent and colored yellow on the R. 136 map is involved. These Pike County lands, according to the "List of Leases" put in by the respondent between R. 12 and 13 at pages 14 to 22 of the list, comprise a total of only 13,869 acres out of 300,000 acres.

The attempt to extend the forfeiture judgment to cover the entire 300,000 acres of the Haskell grant will not survive an examination. That forfeiture judgment affected only lands in Pike County.

Here exists a wide issue of material fact between the parties.

The Proceeding in the Forfeiture Suit Is Not Completed.

As to the lands affected by the judgment of forfeiture the proceeding was but partly completed. The judgment expressly reserved for future adjudication "all other ques-

EXHIBIT "A"
(Part 1)
filed with Affidavit of Geo. A. Cunningham

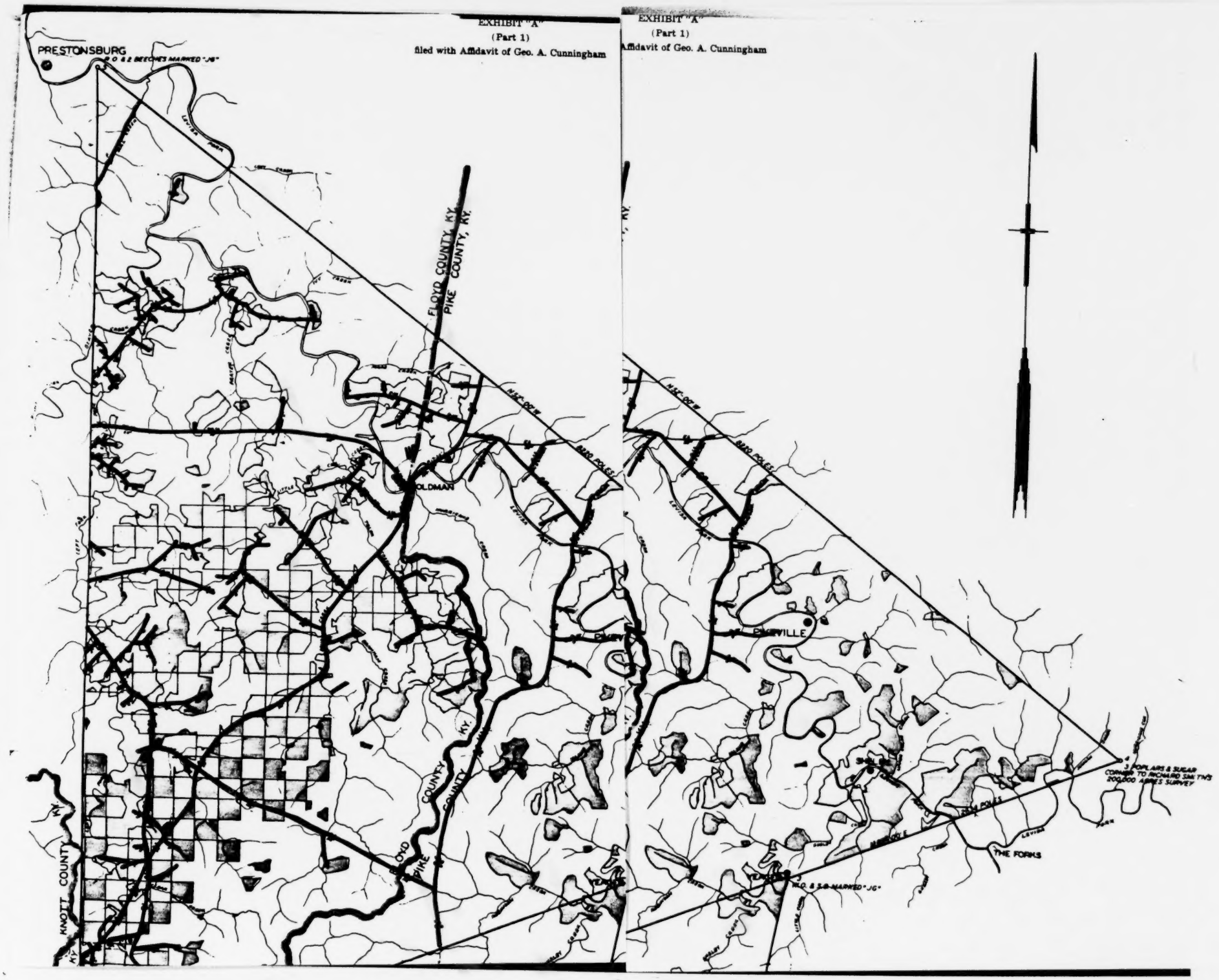
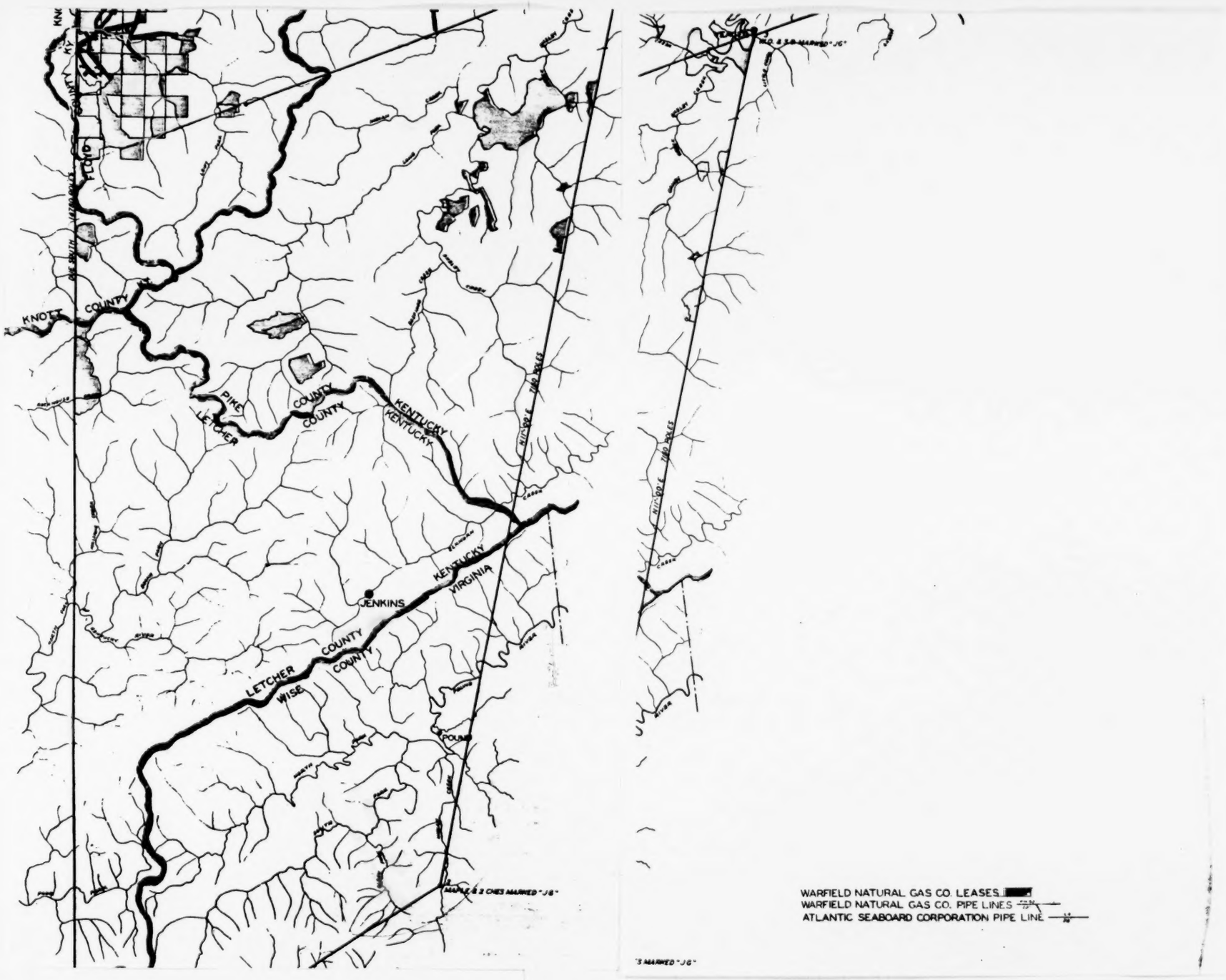


EXHIBIT "A"
(Part 1)
Affidavit of Geo. A. Cunningham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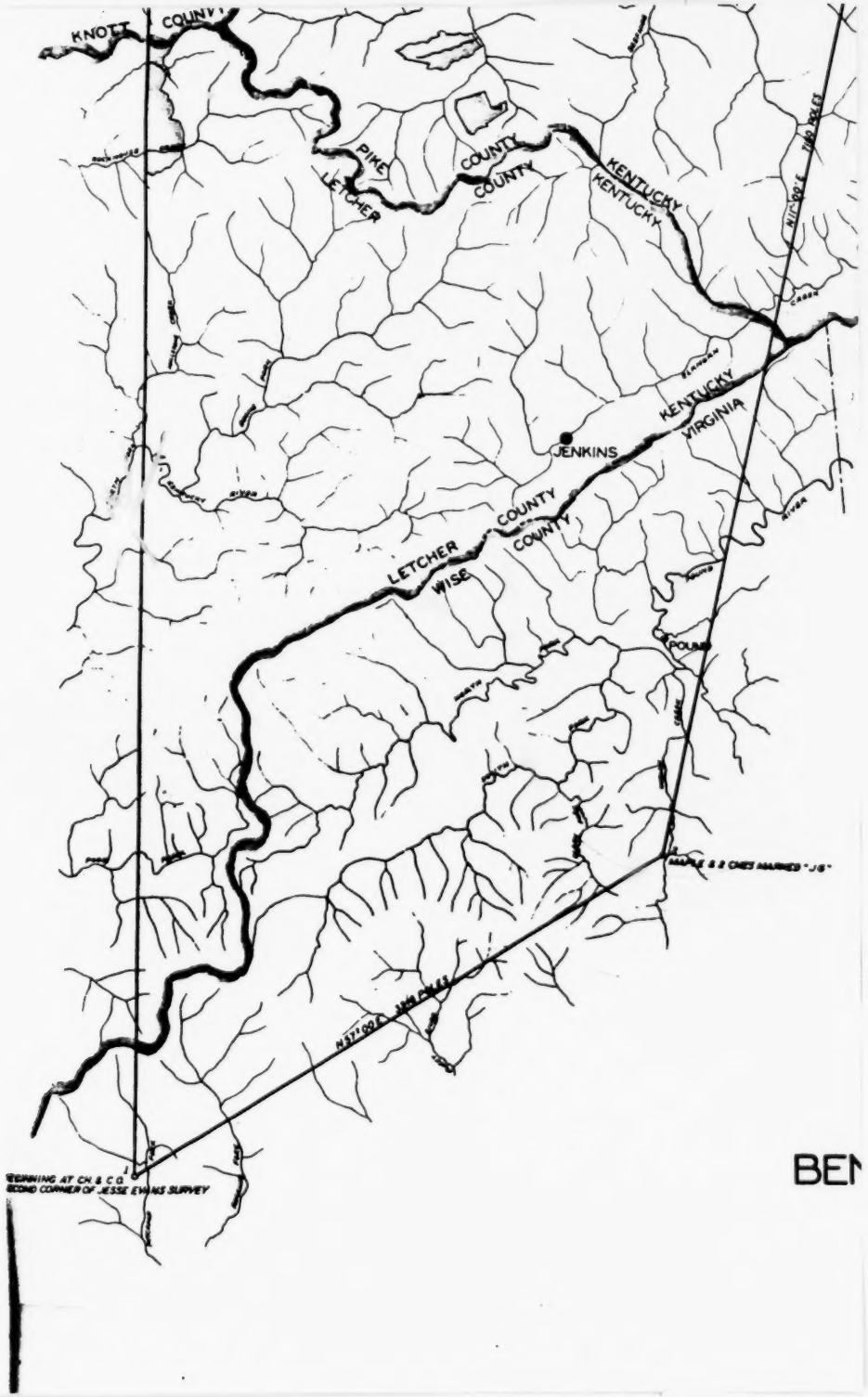
WARFIELD NATURAL GAS CO. PIPE LINES
ATLANTIC SEABOARD CORPORATION PIPE LINE



WARFIELD NATURAL GAS CO. LEASES
WARFIELD NATURAL GAS CO. PIPE LINES
ATLANTIC SEABOARD CORPORATION PIPE LINE

EXHIBIT "A"

MAP SHOWING

BENJAMIN HASKELL PATENT

SCALE

0 1 2 3 4 5 6

MILES

MAY 28, 1940

tions not herein specifically adjudged". See the closing paragraph of the judgment entry. R. 127 at page 129.

It is necessary then to know (1) what complete adjudication required, (2) what was done, and (3) what remains to be done. The statute required the forfeiture judgment to be recorded and indexed as deeds are recorded and indexed. It required proceedings for redemption and purchase back, or a sale of the land with accounting of funds realized and disbursement of the net proceeds. The petition for forfeiture prayed specifically for all these required proceedings. R. 36 at R. 52, folios 108 to 111.

Not one of these further proceedings was completed. R. 214, paragraphs 14 to 17. The case stopped with the partial judgment of forfeiture which ended with this paragraph:

> "All other questions not herein specifically adjudged are reserved for further adjudication to this judgment the Defendants Eastern Kentucky Coal Lands Corporation and C. B. Hillhouse object and except."

This subject of the incompletion of the forfeiture case has been discussed in the briefs in support of the petition for certiorari. However the attention of the court is here invited to the serious consequences of permitting a title to be forfeited against the whole world when there is no record of any transfer of title by forfeiture to be found in the record and index of deeds and the law controlling and prescribing the method of forfeiture specifically and mandatorily requires that the judgment "**shall be recorded in the deed book of the county** where the land or any part thereof lies **and indexed as deeds are required to be indexed.**" R. 246, paragraph 14.

It is pertinent to enquire whether it is becoming to sovereignty to protect a purchaser against an individual who failed to record his deed and yet refuse to protect a purchaser against the sovereignty which clearly and pointedly assured him that any judgment of forfeiture by it must be recorded and indexed as a deed. Such conduct puts the state into the shady business of solemnly assuring the world that its deed records and indexes may be relied upon to show all forfeitures and then asserting that its violation of its own statute is of no consequence. This is especially unbecoming when the state confesses that all its files of the case are lost "or can not be found" and it becomes necessary to go to Washington and dig up in the files of the Supreme Court the records of the Circuit Court of Pike County.

We think this aspect of the case should not be lightly brushed aside.

The Effect of This Court's Decision in 219 U. S. 140 on the Forfeiture Judgment.

The respondent in both courts below has again and again stressed the fact that the forfeiture judgment was "affirmed by the Supreme Court of the United States in 219 U. S. 140". Each of the courts below stressed the same assertion. In like manner as the geographical extent of the forfeiture judgment has without warrant been extended far beyond its limits, and similarly as the partial forfeiture judgment has been construed as complete compliance with the statutory prescriptions as prayed in the petition for forfeiture, or, what is the same thing, compliance has been held to be unnecessary, so the effect of the decision in 219 U. S. 140, has been enlarged far beyond its content.

That decision of this court adjudicated but one issue—was the state statute constitutional under which the forfeiture petition was invoked? No other question was considered; none other was before the court. The first sentence of the opinion limits its effect to "the constitutionality of an act of the legislature of the state, passed March 15, 1906, entitled 'An Act Relating to Revenue and Taxation' ". The petition for forfeiture is based upon this same "Act Relating to Revenue and Taxation' approved March 15, 1906." See the first sentence of the opinion in *Kentucky Union* v. *Kentucky* (*Eastern Ky. Coal Lands Corporations* v. *Commonwealth of Kentucky,* No. 48), 219 U. S. 140, at page 142. See also the prayer of the petition of the Commonwealth in the Pike Circuit Court, R. 36, at page 47, folio 100. At page 151 of the opinion it was pointedly declared that "This court is concerned only with the constitutionality of the law in view of the applicable provisions of the Federal Constitution."

This court in 219 U. S. 140, did not consider what, if any, lands had been comprised in the forfeiture judgment in Case No. 48 originating in Pike Circuit Court. It did not consider the effect of noncompliance with the portions of the statute yet to be adjudicated and administered under the continuance embodied in the last paragraph of the forfeiture judgment. R. 29. It merely held the statute to be constitutional. It did not hold that noncompliance with the statute was effective to forfeit title nor did it hold that the 300,000 acres of the Haskell grant were forfeited by the Pike Circuit Court judgment. See pages 7 to 10 of this petition for rehearing.

We think it is clearly demonstrated that there are yet serious issues as to the materia! fact of whether or not any lands lying outside of Pike County were affected by the forfeiture judgment, and of whether the judgment it-

self was effective. Therefore the first ground on which the courts below based the conclusion that no material issue of fact exists, namely that all the lands of the 300,000 acres were forfeited by judgment of the state court, is untenable.

We pass to an examination of the second ground asserted to support the conclusion that no material issue exists, namely that the petitioner is precluded by adverse possession from evicting the respondent from any of the lands in controversy.

2.

The Claim of Adverse Possession Examined.

The present ejectment suit of the petitioner encompasses the entire Haskell grant of 300,000 acres. The map of the Haskell grant at Record 136 shows that it lies in five counties of Kentucky and Virginia, that is in Pike, Floyd, Knott, and Letcher Counties, Kentucky, and Wise County, Virginia.

In the respondent's answer it asserts it owns real property rights in Pike, Floyd, and Knott Counties and incorporates as "Exhibit A" its "List of Leases" which indicate its claims. The "List of Leases" lists those in Floyd and Pike Counties only. See Answer R. 4 at R. 7, paragraph 15. "List of Leases" R. 12, 22 inserted pages. The respondent's Chief Engineer Cunningham made affidavit and included, as a different "Exhibit A" a map of the Haskell grant showing in yellow all real property rights occupied by the respondent through parties "claiming to own the said lands". This map shows such lands in Pike, Floyd, Knott, and Letcher Counties. R. 134 to 136. The

respondent's Division Superintendent Rowan made affidavit that the wells indicated in "Exhibit A" to the answer have been operated since the date of drilling there indicated, or since 1926 if drilled before then. R. 138.

Note: It is necessary to keep in mind that two very different documents are incorporated in the record by respondent as "Exhibit A". The "Exhibit A" in the Answer is the "List of Leases" at R. 12. The "Exhibit A" in the Cunningham affidavit is the Haskell grant map of R. 136.

In its motion for summary judgment the respondent claims adverse possession against the petitioner as to all the lands which it occupies within the 300,000 acres in the Haskell grant. R. 25 at R. 26, paragraphs 2 and 3. In support of its motion the respondent filed a large number of "Affidavits as to Possession", R. 140 to 218, which we will notice later. It also filed an affidavit by Assessor Sturgill relating to absence of assessment records in the names of the petitioner and certain of its mesne grantors since 1917. R. 219.

The petitioner filed its counter motions and answer on facts denying generally, and also categorically and specifically, the allegations and assertions made by and on the part of the respondent. R. 223 to 231. R. 229, folio 221. R. 230, folio 22. R. 224, folio 225 and 226. R. 242 to 253. R. 254 to 261. R. 257, last paragraph at foot of the page, continuing to R. 261.

In order to appraise the effect of these "pleadings, depositions and admissions on file, together with the affidavits" (quoting from Rule 56(c)) as they relate to the claim of adverse possession against the petitioner in favor of the respondent, it is necessary to examine them. It is also necessary to know something of the standard of proof required.

Rule 56 (c) prescribes that:

> "Supporting and opposing affidavits shall be made on **personal knowledge, shall set forth such fact as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.**"

The Pleadings, Motions and Affidavits Examined.

The Answer of the respondent in its Third Defense, R. 4, paragraph 14, and R. 7, paragraph 15, and also in its Eighth Defense at R. 11, paragraph 25, claims real property rights in designated portions of the lands sued for by the petitioner lying in "Pike, Floyd, and Knott Counties, in Kentucky" which it averred were indicated in its "Exhibit A," "List of Leases." That "Exhibit A," "List of Leases" is at R. 12. In its Cunningham Affidavit at R. 134 and 135, it inserted another "Exhibit A" which is entitled "Map showing Benjamin Haskell Patent". That "Exhibit A," Map of Haskell Grant, is at R. 136. This Cunningham affidavit states that the areas colored yellow on the map "is the territory held by the defendant" [respondent here] under leases from "parties claiming to own" the lands.

One Square Mile of Land in Issue.

Now the respondent's map, Exhibit A at R. 136, shows the respondent occupying a tract in Letcher County, Kentucky, which by the scale of the map (see legend at bottom of map), is over two miles long and from a quarter to a half mile wide, approximately one square mile of land. The respondent asserts that it occupies this land under claim of right against the petitioner, but it has not submitted an iota of evidence or claim showing any right whatsoever to hold this land against the petitioner.

The petition seeks to eject the respondent from this tract of one square mile of land as a part of the 300,000 acres in the Haskell grant. **Here is a grave issue of fact between the petitioner and the respondent.**

Three-eighths of a Square Mile of Land In Issue.

The respondent's map, Exhibit A at R. 136, also shows the respondent occupying an irregular tract in Knott County, Kentucky, which is roughly ½ by ¾ of a mile or 240 acres, that is three-eighths of a section of land.

Respondent's Exhibit A in its Answer, being the "List of Leases", does not mention any lands whatsoever in Knott County.

One of the numerous affidavits submitted by the respondent to support its motion for summary judgment is that of Marion Hall at R. 184. He limits his affidavit to the lands in the respondent's Exhibit A, as a part of its answer which exhibit does not list Knott County. He states at the top of R. 185:

> "The lands particularly described and about which he has personal knowledge in the answer in Exhibit 157 'A' being described by lease number and the lessor are as follows:"

At the bottom of R. 186 he includes "Lease No. 27282 located in Knott County" and says the title came from the heirs of James Hall and that Bill Hall once owned the entire tract of 480 acres; no description or location is given. This Marion Hall affidavit does not in any manner meet the requirements of Rule 56(c) that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Now in the respondent's affidavit of George W. Meade at R. 193, which also is limited to the List of Leases in the Exhibit A in the respondent's answer, he also lists Lease No. 27282. He states at R. 193, folio 170:

> "The tracts more particularly described being marked on 'Exhibit A' of the defendant's answer herein, which he has examined and consists of Lease No. 27282, leased to the Warfield Natural Gas Company by Tipton Hall and Mary Jane Hall of Amba, Kentucky, that the present owners of surface are Wilburn Hall, et al. and the lessors received their title from Rebecca Sturgill, et al., and this tract consists of approximately 33.20 acres."

At page 4 of Exhibit A "List of Leases" we find the lease 27282 listed in Floyd County, lessors Tipton and Mary Jane Hall, new owners, Wilburn, Joe, Bill and Buster Hall, Grantors, various Sturgills, Haynes, a Harkness, a McKinney, and John, Elonder and Andrew Hall. Acreage 33.20. There can be no confusion of lands by reason of contiguity because respondent's Exhibit A, Map of the Has-

kell Grant, designating lands held by the respondent, shows the Knott County tract a mile and a half distant from any other land held by the respondent.

Here also is a grave issue of fact between the petitioner and the respondent.

Boiled down to its essence the situation as to these two tracts of approximately one and a half square miles is this:

The petitioner sued the respondent for ejectment from this one and and one-half square mile area as a part of the 300,000 acre Haskell grant and the respondent moved for a summary judgment showing that it occupies the land. The issue remains and Rule 56 does not authorize a summary judgment.

No Other Land Is Eliminated as an Issue.

The respondent has failed to identify with particularity a single tract which it claims to hold adversely. The only places where it has referred to lands claimed to be held by adverse possession are (1) its answer, R. 4, at R. 7, paragraph 15, and R. 11, paragraph 25; (2) its Exhibit A "List of Leases", R. 12; (3) its motion for summary judgment, R. 25 at page 25, paragraphs 2 and 3 and (4) the various "Affidavits as to Possession", R. 140.

It is utterly impossible to locate any land referred to in any of the respondent's "Affidavits as to Possession" which are the "Defendant's Exhibits 9 to 27" put into the record at R. 140 to 218, or included in its "List of Leases" consisting of the 22 pages inserted at R. 12. Not a single one of the tracts included in the affidavits or in the list of leases can be pointed out either on the ground or on the map.

When tested by the requirements of Rule 56(c) that:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admitted in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

these attempts at eradicating any issue of fact fail to accomplish the intended result. Under the requirement that the affidavit shall "set forth such facts as would be admitted in evidence" let any item of the list of leases or any item of any affidavit be tested. All that the list of leases does is to name a county, give a lease number, its date, place of record, names and addresses of lessors, names and addresses of new owners with date of change, acreage, the serial number and date of any well drilled, name and address of the lessor's grantor with date of conveyance with date, book and page of record. All that the affidavits do is to give a lease number, name of lessor and lessee, acreage sometimes, with a statement that the affiant knows the land or some one in a claimed chain of title.

In short there is no fact given from which it is possible to take the only evidence submitted by the respondent as to the tracts it occupies, that is the map of the Haskell grant at R. 136 where it has colored in yellow the tracts it occupies, and check off the tracts one by one until it is demonstrated that the respondent even claims to have any right to all it admits that it occupies. It is to be remembered that the map of the Haskell grant, at R. 136, is no claim whatever to adverse possession. It is nothing but an admission that it **occupies** certain tracts—not that it claims any right of occupancy. The Cunningham affidavit of which it is a part limits its effect strictly to "territory **held** by the defendant". R. 135, end of affidavit.

The respondent has wholly failed to show any claim of right to adverse possession to all of the lands from which the petition seeks its eviction.

In this respect there is a grave issue as to material facts.

CONCLUSION.

Beyond all doubt "the pleadings, depositions and admissions on file, together with the affidavits" show that a "genuine issue" exists as to the claimed fact of forfeiture of the lands in Floyd, Knott and Letcher counties. (The quoted words are from Rule 56(c).) Likewise there exists a "genuine issue" as to the claimed fact of adverse possession by the respondent of all the lands admitted to be occupied by the respondent within the area from which the petition seeks its eviction.

The existence of these issues being demonstrated, they being the only issues considered by either of the courts below, it follows that the judgments below were not authorized by Rule 56 of the Rules of Civil Procedure and they are contrary to the laws of the United States and in conflict with decisions as set up in the petition and brief for a writ of certiorari. Therefore certiorari should be granted.

ELMER MCCLAIN, Lima, Ohio,
JAMES A. COSGROVE, Washington, D. C.,
Counsel for the Petitioner.

Lima, Ohio
February 14, 1944.

Certificate of Counsel.

I certify that the foregoing petition for rehearing is filed in good faith and not for any purpose of delay.

ELMER MCCLAIN, Lima, Ohio,
Counsel for Petitioner.

Lima, Ohio
February 14, 1944.